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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KENNETH B. DAUER,

Plaintiff and Appellant,

v.

JAMISON REALTY, INC., et al.,

Defendants and Appellants.

B246010

(Los Angeles County
Super. Ct. No. BC448075)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Kevin C. Brazile, Judge. Reversed in part and affirmed in part.

The Dressler Law Group and Thomas W. Dressler for Plaintiff and Appellant.

Norton & Melnik, Geoffrey P. Norton, Joel Witzman; Cha & Nam and Jason Cha
for Defendants and Appellants.

Plaintiff Kenneth B. Dauer sued to recover his commission pursuant to a commercial real estate commission registration agreement (commission agreement) for the California National Bank (CNB) property located at 555 East Ocean Boulevard in Long Beach (the Property). Following a bench trial, the court found that a condition precedent to Dauer's right to a commission had not been satisfied, and the commission agreement had expired before the commercial lease was executed. Therefore, Jamison Realty, Inc. (Jamison), the owner's leasing agent, and 555 Ocean L.P., the owner of the Property (Owner), did not breach the commission agreement by failing to pay Dauer's commission. The court, however, awarded Dauer a quantum meruit recovery, notwithstanding its finding that there was no breach of the commission agreement. Both parties appeal. We conclude the trial court erred in awarding quantum meruit damages to Dauer. Thus, we reverse the judgment awarding Dauer \$30,000 and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*¹

a. *The Commission Agreement*

CNB designated Dauer, a real estate broker with Kenco Realty, as the exclusive broker to renegotiate the lease renewal for the Property. Dauer requested and obtained a commission agreement from Jamison and Owner.

The commission agreement provides: "555 Ocean LP, . . . accepts your registration based on your representation that California National Bank or successor in interest . . . has designated Kenco Realty . . . to act exclusively in its behalf and that no other designation (exclusive or otherwise) has been made by [CNB] as to any other real estate brokers." The commission agreement was fully executed on November 1, 2009 and remained in effect for 180 days, expiring by its own terms on April 30, 2010.

¹ The parties stipulated to an agreed statement. (Cal. Rules of Court, rule 8.134.) "The statement must explain the nature of the action, the basis of the reviewing court's jurisdiction, and how the superior court decided the points to be raised on appeal. The statement should recite only those facts needed to decide the appeal and must be signed by the parties." (*Id.*, (a)(1).)

The parties had negotiated in principle the terms of the lease. Dauer had conducted extensive negotiations and submitted multiple draft proposals.

b. *U.S. Bank Acquires CNB, Dauer Does Not Obtain U.S. Bank Designation*

Before the lease was executed, however, federal regulators closed CNB, and the Federal Deposit Insurance Corporation (FDIC) was appointed receiver for the failed bank. The FDIC executed a Purchase and Assumption Agreement with U.S. Bank National Association (U.S. Bank) to acquire CNB.² U.S. Bank then began an evaluation process of CNB branches to determine which ones would remain open.

On April 6, 2010, before the commission agreement expired, Dauer sent an e-mail to U.S. Bank requesting that it designate him as its broker. U.S. Bank did not designate Dauer.

c. *U.S. Bank Executes Lease Renewal*

U.S. Bank executed a lease for the Property on July 12, 2010, almost three months after the commission agreement expired. Jamison and Owner did not pay a commission to Dauer.

2. *Superior Court Proceedings*

a. *Complaint, Court Trial*

Dauer filed a complaint against Jamison and Owner to collect \$63,996.48, the commission he would have earned under the terms of the commission agreement. Dauer alleged the commission was “fully earned” based upon his role as CNB’s broker as he had performed in accordance with the terms of the commission agreement. The complaint stated causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and a common count for services rendered.

During the court trial, Dauer testified that the terms in the commercial lease U.S. Bank executed were essentially the same as the lease terms he negotiated as CNB’s

² We take judicial notice of the “fact” of the Purchase and Assumption Agreement dated as of October 30, 2009, available on the FDIC website. (Evid. Code, § 452, subds. (c), (h); see also *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752-761.)

exclusive broker. Dauer spent about 100 hours on the transaction, and although he was not paid an hourly fee, he estimated an hourly rate of \$300.

Jamison and Owner did not pay Dauer a commission because U.S. Bank did not designate him as its broker, and the lease was executed after the commission agreement expired.

b. *Court Awards Quantum Meruit Recovery*

The trial court concluded that the defendants (Jamison and Owner) did not breach the commission agreement because U.S. Bank did not designate Dauer as its broker, which was a condition for the commission payment pursuant to the “express terms of the contract.” Moreover, the registration period was not extended either orally or in writing and had expired by the time the lease renewal was executed. For these reasons, the trial court also concluded there was no breach of the implied covenant of good faith and fair dealing.

The trial court, however, awarded Dauer \$30,000 for services rendered in negotiating the lease as CNB’s exclusive broker.

By minute order dated September 12, 2012, the trial court notified the parties of the judgment. The trial court corrected clerical errors in the judgment by order dated October 10, 2012. Notice of entry of judgment was served on October 24, 2012.

c. *Motions for New Trial, Appeal, Cross-Appeal*

On October 26, 2012, Dauer served a notice of intent to move for new trial, or to vacate the judgment and enter a new judgment in the amount of \$63,996.48, representing the commission owed plus interest based on a breach of the commission agreement. The trial court denied the motions.

Jamison and Owner filed a notice of intent to move for a new trial on November 14, 2012, challenging the court’s decision to award quantum meruit damages. This motion was untimely. Nevertheless, in ruling on Dauer’s motion for new trial, the trial court addressed the issue. In support of the award, the trial court distinguished *Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410 (*Hedging Concepts*), and concluded that equitable relief was available here because the

award of quantum meruit did not “contradict an express term in the contract. Defendants have failed to show that the contract’s provisions for the payments of a commission were the exclusive provisions regarding any payments.”

Dauer timely filed a notice of appeal. Jamison and Owner filed a timely notice of cross-appeal.

On appeal, Dauer contends he is entitled to his commission based upon either a breach of the commission agreement or as the reasonable value of his services. Owner and Jamison contend *Hedging Concepts, supra*, 41 Cal.App.4th 1410 bars quantum meruit recovery. We discuss these contentions in turn, concluding the trial court erred in awarding quantum meruit damages to Dauer.

DISCUSSION

1. *Jamison and Owner Did Not Breach the Commission Agreement*

Dauer contends the trial court erred in finding that Jamison and Owner did not breach the commission agreement. Although Dauer argues that our review is de novo, there are two aspects to our review of the trial court’s breach of contract findings. We agree that assessing the parties’ respective obligations under the commission agreement is a matter of contract interpretation. In the absence of extrinsic evidence, the interpretation of a contract is a question of law. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 799.) Whether Jamison and Owner actually breached obligations under the commission agreement is a question of fact, to which we apply the familiar substantial evidence test. (*Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1268; *Porter v. Arthur Murray, Inc.* (1967) 249 Cal.App.2d 410, 421-423.) “ ‘Substantial evidence . . . is not synonymous with “any” evidence.’ Instead, it is ‘ “ ‘substantial’ proof of the essentials which the law requires.” ’ [Citations.]” (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) We view the evidence in the light most favorable to the prevailing parties and draw all reasonable inferences and resolve all conflicts in their favor. (*Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1128-1129.)

a. *The Designation Clause Did Not Bind U.S. Bank as CNB's Successor*

Dauer reads the commission agreement in such a manner that U.S. Bank is bound as CNB's successor in interest. The trial court read the commission agreement as requiring U.S. Bank to designate Dauer. In reaching this conclusion, the trial court engaged in an interpretation of the parties' contract. Accordingly, the de novo standard governs our review.

The commission agreement states Owner accepts Dauer's representation that CNB "or successor in interest," has designated Kenco Realty to act exclusively on "its behalf" and that the prospective tenant (CNB or successor in interest) has not made any other designation as to any other real estate broker. The use of the disjunctive "or," in the designation clause represents an alternative, Dauer has represented that, CNB or (in the alternative) its successor in interest has designated him "to act exclusively in its behalf." The commission agreement contains no language that would bind the successor, unless the successor affirmatively designated Dauer as its broker. Because U.S. Bank did not designate Dauer, a condition precedent for payment of the commission was not satisfied.

b. *Dauer's Registration Expired*

Dauer next contends the trial court erred in concluding that he was not owed a commission as he performed under the commission agreement, and the failure to execute the lease on the Property during the 180-day registration period was excused because of the unforeseeable event of CNB's failure, the FDIC takeover, and U.S. Bank's delay in determining which branches would remain open. In making this contention, Dauer raises several arguments. None has merit.

First, Dauer argues that he could not have obtained an extension of his registration because the lease already had been "fully negotiated" when U.S. Bank took over. The commission agreement provides: "Owner will agree to enter into a written extension of this registration for 180 days if an extension is requested by Broker in writing and *if active lease negotiations are in progress* as evidenced by meetings among Owner's leasing agent [Jamison], Broker and the Prospect [tenant]." (Italics added.) Dauer's emphasis on the completed negotiations on CNB's behalf overlooks that before the

commission agreement expired, he was no longer the prospective tenant's (U.S. Bank) broker.

Second, Dauer argues that his performance was both impossible and impractical because of CNB's failure, the FDIC takeover, and U.S. Bank's decision to evaluate whether to continue operations at certain branches. Dauer supports this argument by citing to *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306. In *Habitat Trust*, a developer sought to cancel a contract to convey certain mitigation land to a nonprofit entity for conservation purposes in exchange for the nonprofit's agreement not to object to the development. (*Id.* at pp. 1314, 1333.) In moving for summary judgment on the contractual claims asserted in the nonprofit's complaint, the developer argued the city's approval of the transfer of mitigation land to the nonprofit was an implied condition of the contract that was not fulfilled. (*Id.* at p. 1333, 1335.) Because the implied condition did not come to pass, the appellate court affirmed summary judgment, concluding the developer had no duty to perform under the agreement. (*Id.* at p. 1335; Civ. Code, § 1436 ["A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."].) Here, CNB's failure was an unexpected event that delayed signing the commercial lease during the 180-day registration period, but it was unrelated to the condition precedent in the commission agreement that required CNB's successor to designate Dauer as its broker. This condition went to the very existence of an enforceable contract. Thus, we read *Habitat Trust* to support the trial court's conclusion.

Third, Dauer maintains his nonperformance, that is, to complete the lease renewal within the 180-day registration period, was excused by "frustration of purpose" once CNB failed because U.S. Bank took "all the time it wanted to determine whether it wished to continue with a bank branch" and the lease was in "limbo" as Jamison could not seek a different tenant and Dauer "had no further work to do." The elements of the doctrine of frustration of purpose are: " 'Performance remains entirely possible, but the whole value of the performance to one of the parties at least, and the basic reason

recognized as such by *both* parties, for entering into the contract has been destroyed by a supervening and unforeseen event.’ ” (*Dorn v. Goetz* (1948) 85 Cal.App.2d 407, 410-411.) The doctrine does not apply to the facts of this case. The obligation to pay Dauer’s commission arose only if Dauer obtained U.S. Bank’s designation to act on its behalf during the registration period, and thereafter obtained a renewal or extension. U.S. Bank’s delay in executing the lease did not excuse Dauer’s performance on the contract to obtain the designation as its broker. A party who claims a frustration must show that he is harmed. (*Id.* at p. 415.)

Finally, Dauer contends that Jamison and Owner offered “no evidence” that the 180-day limit on the registration provision was a material term. Even if this were true, U.S. Bank’s designation of Dauer as its broker was a material term that was not satisfied. Accordingly, for the reasons stated, the trial court did not err in concluding that Dauer failed to prove a breach of the commission agreement.

2. *Jamison and Owner Did Not Breach the Implied Covenant of Good Faith and Fair Dealing*

Dauer has forfeited any challenge to the court’s finding that Jamison and Owner did not breach the implied covenant of good faith and fair dealing by failing to present argument in his opening brief. (*Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1161-1162.) Nevertheless, based upon our standard of review, the trial court did not err.

“ ‘The covenant of good faith and fair dealing[] [is] implied by law in every contract.’ ” (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1369.) “The covenant is read into contracts and functions ‘ “as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party’s rights to the benefits of the contract.” ’ [Citation.]” (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244; see also *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 373.) The implied covenant also requires each party to do “everything the contract presupposes the party

will do to accomplish the agreement's purposes." (*Thrifty Payless, Inc.*, at p. 1244.) A breach of the implied covenant of good faith and fair dealing is a breach of the contract, and a breach of a specific provision in the contract is not required to prevail on a claim for breach of the implied covenant of good faith and fair dealing. (*Ibid.*)

Dauer based this claim on the allegations that Jamison and Owner "refus[ed] to honor the terms of the Commission Agreement and/or ma[de] attempts to circumvent the requirements of the Commission Agreement with the intention of depriving Dauer of the commission fee he has rightfully earned." At trial, Dauer testified the terms of the lease U.S. Bank executed were essentially the lease terms he had negotiated, entitling him to a commission. Dauer's right to a commission, however, was dependent upon obtaining a broker designation from U.S. Bank and completing the deal within 180-day registration, or obtaining a renewal or extension. There is no evidence in the record that Jamison or Owner made any attempts to frustrate Dauer's rights to the benefit of the commission agreement.

3. *Dauer Cannot Recover Quantum Meruit Damages as a Matter of Law*

Neither Dauer nor Jamison and Owner agree with the court's quantum meruit award. Dauer contends the trial court erred because he is entitled to the commission owed as the measure of his quantum meruit damages. Jamison and Owner contend Dauer is not entitled to any quantum meruit damages. We agree with Jamison and Owner.

By the terms of the commission agreement, Dauer was designated as CNB's exclusive broker and would attempt to secure renewal of the commercial lease on the Property during the registration period. If CNB executed the commercial lease, Dauer would have been paid a commission based upon the fixed base rental for the term of the lease. If CNB did not execute the commercial lease, Dauer would not have received any compensation. The trial court necessarily concluded the right to commission was contingent upon execution of the lease, not negotiating the terms of the lease. As we have discussed, the trial court found, and substantial evidence supports its factual finding, that Dauer did not perform and Jamison and Owner did not breach the commission agreement.

The trial court's award of quantum meruit damages conflicts with the commission agreement. A quantum meruit recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice. (*Hedging Concepts, supra*, 41 Cal.App.4th at p. 1419.) There is no equitable basis for an implied-in-law promise to pay reasonable value, however, when the parties have an actual agreement covering compensation. (*Ibid.*) “ ‘The reason for the rule is simply that where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability. . . .’ ” (*Ibid.*) Thus, where there is an express contract between the parties governing the compensation in question, quantum meruit will not lie because the law will not imply a promise to pay the reasonable value of the services at variance with the parties' agreement.

Here, like in *Hedging Concepts*, there is an express contract between the parties governing Dauer's compensation for services rendered as CNB's broker, which was tied to a percentage of the fixed base rental over the term of the lease. If Dauer's client (CNB) did not execute the lease, despite his best efforts in negotiating the lease, he was not entitled to the commission. No other compensation terms could be implied.

We reject Dauer's attempt to distinguish *Hedging Concepts*. Dauer argues that in *Hedging Concepts*, unlike here, the dispute arose because the parties disagreed on a contract term covering payment. This distinction does not alter our legal analysis as Dauer's reading of *Hedging Concepts* overlooks that once the court interpreted the contract term in dispute, it held that the plaintiff did not perform a condition precedent to receive payment. In light of that factual finding, the quantum meruit award conflicted with the contract term covering payment. (*Hedging Concepts, supra*, 41 Cal.App.4th at pp. 1419-1420.) Here, just as in *Hedging Concepts*, the trial court made a factual finding that a condition precedent to payment under the commission agreement had not been satisfied. In light of this factual finding, the trial court erred in concluding that Jamison

and Owner had an implied-in-law duty to pay Dauer.³ The commission agreement governed Dauer's right to compensation, and the court cannot, even under equity jurisprudence and concepts of fairness rewrite the parties' contract. Accordingly, the quantum meruit award cannot stand.

³ Based upon this conclusion, it is not necessary to address Dauer's argument that his quantum meruit recovery should have been the commission owed.

DISPOSITION

The judgment awarding \$30,000 in quantum meruit damages to plaintiff Kenneth B. Dauer is reversed. In all other respects, the judgment is affirmed. Each party is to bear its own costs on appeal.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.