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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DAVID H. PIERCE et al., Plaintiffs and Appellants, v. FIORELLA URBINATI, Defendant and Appellant.	B221711 (Los Angeles County Super. Ct. No. SC090095)

APPEALS from a judgment and orders of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Reversed with directions.

Morris Polich & Purdy, Mark E. Hellenkamp, Dean A. Olson and Penelope M. Deihl for Defendant and Appellant.

David H. Pierce & Associates, David H. Pierce, in pro. per., and Charles A. Pressman for Plaintiffs and Appellants.

Defendant and appellant Fiorella Urbinati (Urbinati) appeals a $275,000 judgment on a special verdict obtained by plaintiffs and appellants David H. Pierce (Pierce) and Ilysia J. Pierce (collectively, Pierce or the Pierces), and an order denying her motion for judgment notwithstanding the verdict (JNOV).

The Pierces also appeal the judgment insofar as the trial court denied their motion for prejudgment interest, and from a subsequent order denying their motion for attorney fees.

The Pierces purchased Urbinati's home. The gravamen of their lawsuit is that Urbinati breached her duty to disclose adverse material facts which were known to her regarding the condition of the property. Based on our review of the record, we conclude Urbinati was entitled to JNOV because there is no substantial evidence to support the verdict. The record establishes the Pierces were duly advised as to the condition of the property. Accordingly, the order denying Urbinati's motion for JNOV is reversed with directions to grant the defense motion.

FACTUAL AND PROCEDURAL BACKGROUND[1]

1. *Facts*.

Pierce is an attorney with nearly 20 years experience. His practice consists of civil litigation, primarily construction defects. He formerly was a real estate licensee, had

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[1] California Rules of Court, rule 8.204(a)(1)(C), states each brief must support any reference to a matter in the record with a citation to the volume and page number of the record where the matter appears. The Pierces, in their respondent's brief, attack Urbinati's opening brief for failing to submit a proper statement of facts. However, it is the Pierces' brief which is completely deficient. Their respondent's brief argues the trial court properly denied JNOV because the verdict is supported by substantial evidence; however, the brief does not contain a single citation to the reporter's transcript of the two-week trial. Although the Pierces' brief was noncompliant, because the matter was already fully briefed, this court elected to disregard the noncompliance and resolve the matter on the merits (Cal. Rules of Court, rule 8.204(e)), so as to expedite the matter and relieve Urbinati of the necessity to revise her appellant's reply brief. Following oral argument, the parties were given the opportunity to file supplemental letter briefs addressing the evidence at trial.

worked in construction when he was younger, and had been a residential property claims adjuster.

Urbinati, an art dealer, acquired the subject real property in Brentwood in 1998. In 1999, she built a 5,900 square foot home on the site with a contractor, Gary Silverston. In 2001, she also obtained a permit to build a backyard pool on a steep hillside but did not go forward with that project.

In 2004, Urbinati listed the property for sale with Robert Radcliffe, a real estate agent who ultimately represented both parties to the transaction. Radcliffe determined that based on the quality of the home, its square footage and lot size, it should be priced at $3.5 million when completed. However, because Urbinati did not want to improve the exterior with landscaping and a swimming pool, the property was listed at $2,999,000.

In March 2004, the Pierces and Urbinati entered into a purchase agreement and opened escrow at $2.85 million. Paragraph 7B of the residential purchase agreement and joint escrow instructions obligated Urbinati "to disclose known material facts and defects affecting the property, . . . and make other disclosures required by law."

During the three-month escrow period, the Pierces were provided with various disclosure documents, including a real estate transfer disclosure statement (Civ. Code, § 1102 et seq.), and a "Platinum Report" containing historical permits from the City of Los Angeles Department of Building and Safety. They were also provided with a Buyers' Inspection Advisory, advising them to conduct investigations of the entire property, including soil stability, building permits and governmental requirements.

The Pierces retained numerous experts to inspect the property. Patrick Morrissey, a licensed general contractor, inspected the property during the first week of the escrow and provided the Pierces with a 17-page report. Next came a civil engineer, John Black, to "inspect the grade and drainage on the property." Pierce knew "through [his] own life experience, having lived up Benedict, drainage is a big issue in L.A. And this particular lot that we had on Westgate was unfinished. So it was dirt. And . . . I wanted to know what I was getting into." After the civil engineer came Derrick Toole, a drainage contractor, who made five or six recommendations to remedy the grade and drainage on

the property. In addition, Pierce brought out a geotechnical engineer, who studies soils, to examine the backyard area. Pierce was concerned because there was a severe downslope in the rear yard, with a 17-foot drop in elevation over a distance of 25 feet; due to the condition of the land, the lender required the rear French doors be permanently sealed, because if one were to exit the rear doors one would drop down. The Pierces also conducted a mold inspection.

Following the removal of buyers' contingencies, escrow closed on June 16, 2004.

2. *Pleadings.*

On June 19, 2006, two years after the close of escrow, the Pierces filed suit against Urbinati. The Pierces' sole cause of action which survived demurrer is the second cause of action of the operative second amended complaint, which pled breach of a written contract. Said cause of action, which ultimately was tried to a jury, alleged in pertinent part:

On June 16, 2004, the Pierces entered into a written contract to purchase Urbinati's home on South Westgate in Brentwood for $2,850,000 "in exchange for possession of the Subject Property in a habitable condition and free from defects." In the agreement, Urbinati undertook to "disclose known material facts and defects affecting the property, . . . and make other disclosures required by law." Urbinati "further assumed the duty 'to disclose to [Pierce] materials facts known to [her] that affect the value or desirability of the Property.' " Urbinati breached the agreement by failing to deliver the property in a habitable condition and free from defects, and by concealing "facts and defects significantly affecting the value and desirability of the Subject Property, including, but not limited to, the existence of significant mold growth, water intrusion at different locations, a defective roofing system, a non-working refrigerator, and defective and damaged stove-top cabinetry."

The complaint sought damages in excess of $500,000 plus interest thereon.

3. *Trial and verdict.*[2]

At trial, the Pierces sought damages of at least $1,046,000. The chief items complained of were: (1) an undisclosed watercourse setback at the rear of the property; (2) the undisclosed quantity of fill dirt in the side yard; (3) nondisclosure of single-paned windows and absence of window coverings; and (4) undisclosed water intrusion from exterior decks.

As for other items of damage, the Pierces asserted (1) Urbinati failed to disclose that a pantry refrigerator was not working; (2) she had made attempts to deal with an ongoing bee infestation; (3) she removed the telephone system which had been marketed as one of the features of the home; (4) two of the fireplaces were not operational; and (5) Urbinati painted over a burned section of wood cabinetry near the stovetop which had been scorched; and (6) she failed to disclose a leak in the atrium.

The jury returned a special verdict. The jury responded "yes" to question No. 4, which asked "Did . . . Urbinati fail to do something that the contract required her to do?" The jury awarded the Pierces $275,000 in damages for the breach of contract.

4. *Motion for JNOV.*

Following the verdict, Urbinati brought a motion for JNOV. She contended all the alleged defects were noted in the inspection reports, were unknown to her, were disclosed by her, or were otherwise communicated to the Pierces.

5. *Trial court's ruling on motion for JNOV*.

On December 10, 2009, after hearing argument on the motion for JNOV, the trial court denied the motion. It ruled as follows: "The thrust of the motion is that the evidence presented at trial did not substantiate the jury's finding of [Urbinati's] failure to disclose. As is noted in the opposition brief, the evidence presented at trial, viewed in Plaintiffs' favor, constitutes substantial evidence sufficient to support the jury's verdict.

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[2] In view of the issues on appeal, we need not recite the facts at this juncture in any great detail. We discuss, *infra*, in the Discussion section, in our separate consideration of the various claims of nondisclosure, the facts pertinent to each claimed item of damage.

Accordingly, the Court will exercise its broad discretion to deny the motion." (Italics added.)[3]

6. *Appeals*.

On January 8, 2010, Urbinati filed notice of appeal from the October 5, 2009 judgment entered on the verdict and from the December 10, 2009 order denying her motion for JNOV.

On January 8, 2010, the Pierces filed a cross-appeal from the October 5, 2009 judgment insofar as it denied Pierce's post-trial motion for prejudgment interest, and from the November 19, 2009 order denying Pierce's motion for attorney fees.

CONTENTIONS

Urbinati contends the order denying her JNOV motion should be reversed because the undisputed evidence established (1) as a matter of law, Pierce had actual or constructive knowledge prior to purchase of each of the purported undisclosed conditions upon which their significant damages claims rested, and (2) Pierce's de minimis other claims rested on purported nondisclosures that did not materially affect the value or desirability of the property.

On cross-appeal, the Pierces contend the trial court erred in denying their post-trial motions seeking attorney fees and prejudgment interest.

DISCUSSION

1. *Standard of appellate review.*

"Well-settled standards govern judgments notwithstanding the verdict: 'When presented with a motion for JNOV, the trial court cannot weigh the evidence [citation], or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict

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[3] Contrary to the trial court's ruling, a decision to grant or deny a motion for JNOV is a matter of law, not a matter of discretion. "A party is entitled to judgment notwithstanding the verdict only if there is no substantial evidence to support the verdict *and the evidence compels a judgment for the moving party as a matter of law*." (*Paykar Construction, Inc. v. Spilat Construction Corp*. (2001) 92 Cal.App.4th 488, 493, italics added; see § 1 of Discussion, *post*.)

should be denied. [Citations.] A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom in support of the verdict, the motion should be denied. . . . The same standard of review applies to the appellate court in reviewing the trial court's granting of the motion. [Citations.] Accordingly, the evidence . . . must be viewed in the light most favorable to the jury's verdict, resolving all conflicts and drawing all inferences in favor of that verdict.' [Citation.]" (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 258-259.)

2. *General principles re seller's duty of disclosure.*

Paragraph 7B of the residential purchase agreement and joint escrow instructions obligated Urbinati "to disclose known material facts and defects affecting the property, . . . and make other disclosures required by law." This "contractual duty of disclosure is no different than the obligation imposed by case law, and therefore added nothing to [the seller's] duty of disclosure." (*Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 410, fn. 4 (*Assilzadeh*).)

In the " 'context of a real estate transaction, "[i]t is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property . . . and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]" [Citations.] Undisclosed facts are material if they would have a significant and measurable effect on market value. [Citation.] A breach of this duty of disclosure will give rise to a cause of action for both rescission and damages. [Citation.]' [Citations.] The seller or his or her agent must have actual knowledge in order to be liable for failing to disclose a material fact. [Citation.]" (*Assilzadeh, supra,* 82 Cal.App.4th at p. 410.)

3. *On the record presented, the trial court erred in denying JNOV.*

We address the claimed defects seriatim.

a. *Watercourse setback in backyard.*

The Pierces contended Urbinati failed to disclose the existence of a watercourse setback in the rear portion of the property, a condition which would limit the development of the backyard.[4] The record is contrary.

Initially, the Pierces were advised in writing to investigate all permitting and governmental requirements which would affect development of the property.

Mrs. Pierce admitted at trial that during the escrow, the issue of a backyard *setback* came up but they didn't follow up on the matter.

The evidence also established that during the escrow, the Pierces obtained a "Platinum Report" from the realtor which included copies of historical permits for the property. The packet, which contained a series of permits printed out on March 24, 2004, included a copy of the pool and spa permit that Urbinati obtained in 2001 from the Department of Building and Safety. Section 14 of the pool permit stated in relevant part: "see modification dated 5/11/01 to allow site drainage from pool and deck area *to drain into the existing watercourse area*." (Italics added.)[5]

At trial, Pierce initially denied seeing the pool permit during the escrow period, but later he merely testified he did not *remember* receiving a copy of the pool permit. With respect to the permits, which were all in the same packet, Pierce then stated, "I saw probably a majority of the permits." However, in the real estate transfer disclosure

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[4] The City requires landowners to keep watercourses unimpeded in order to allow the free flow of water and avoid flooding downstream. At the time Urbinati owned the property, the presence of the watercourse precluded construction on a five-foot setback determined by the Department of Building and Safety. Urbinati's proposed pool was set back eight feet from the property line.

[5] During escrow, Urbinati advised the Pierces in writing that the pool permit "is expired and therefore I cannot guarantee that the project can be build [*sic*] as proposed." However, the Pierces were not interested in installing a pool in the backyard. They merely wanted a flat area in the rear yard where their children could play.

statement, which was signed by the Pierces during escrow, they acknowledged having "seen all permits."[6]

Thus, with respect to the Pierces' ability to develop the backyard, which was severely sloped, with a 17 foot change in elevation over a distance of 25 feet, the evidence established: the Pierces admittedly knew of a setback in the backyard, and also knew Urbinati had obtained a permit to build a backyard pool and that said permit had expired. Further, the real estate transfer disclosure statement, which was signed by the Pierces, stated they had "seen all permits." Thus, the evidence established the Pierces saw the expired pool permit. Therefore, the Pierces either knew or should have known of the existence of the *watercourse*, given the information set forth in the pool permit which they received during escrow.

In sum, this record belies the Pierces' contention they purchased the property unaware of the presence of the watercourse setback.

b. *Absence of dual-paned windows and absence of window coverings*.

The Pierces sought damages for the expense of replacing 1,014 single-glazed window panes with dual-glazed window panes. Paul Viau, a general contractor whom the Pierces consulted in June 2005 (one year after the closing), testified that regulatory requirements (Cal. Code Regs., tit. 24) called for double-paned windows for energy conservation. Alternatively, if single-glazed windows were installed, window coverings were required. In June 2005, at the Pierces' request, Viau performed a visual inspection of the property, looking for conditions that were in his opinion "problematic."

Leaving aside the fact that Urbinati obtained a certificate of occupancy for the home which she constructed, which approval reflected the structure satisfied code requirements, the absence of dual-glazed windows and the absence of window coverings

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[6] The real estate transfer disclosure statement indicated: "Buyer has seen all permits and correspondence and reports. Side yard at home is not complete and presently has dangerous slope. Buyer has been advised to seek advice from professional inspectors: physical; geo, soils, structural, mold, title (for neighbor & subject property permits) and survey."

on 1,014 window panes were facts either known to, or within " ' "the reach of the diligent attention and observation of the buyer." ' " (*Assilzadeh, supra*, 82 Cal.App.4th at p. 410.) The visual inspection which Viau conducted in June 2005 could have been obtained one year earlier, during the escrow. Accordingly, Urbinati had no duty to disclose the absence of dual-glazed windows or window coverings to the Pierces.

c. *Water intrusion from exterior decks*.

The Pierces' claim they were not duly advised of water intrusion from exterior decks is belied by the record.

The Morrissey inspection report, which the Pierces procured during the escrow, states in pertinent part: "The up-stairs patios are beginning to show age and should be re-sealed as required. Past water leakage has been noted at many of the exterior doors leading to these patios. The elevation of the patios is near the same elevation as the finished floor of the home (leakage may occur if the patios are not properly sealed)."

Thus, the Pierces' own expert advised them the upstairs decks required repair, showed evidence of past leakage, and were defective in design, in that the elevation of the decks was nearly the same as the finished floor of the home. In view of the Morrissey report, which supplied the Pierces with actual knowledge of water intrusion from the exterior decks, the Pierces cannot complain of nondisclosure in that regard.

d. *Presence of fill dirt in the side yard*.

On the real estate transfer disclosure statement, with respect to whether Urbinati was aware of "6. Fill (compacted or otherwise) on the property or any portion thereof," Urbinati responded, "Yes."

Urbinati further elaborated, "In view of the above described construction [referring to the proposed swimming pool] some dirt that will be needed later has been stored on the side yard. Although the dirt is below the city requirements it has not been properly graded (as some should be removed and reused in the back). Therefore the side yard should properly [be] graded for drainage (and aesthetic) reason."

The Pierces contended there were massive quantities of fill dirt in the side yard that was not disclosed.

However, as indicated, Urbinati expressly disclosed the presence of fill dirt in the side yard. Further, the real estate transfer disclosure statement advised the Pierces the "side yard at home is not complete and presently has dangerous slope."

Further, Pierce testified at trial the sod which had been laid in the side yard was "basically lipstick and rouge to me. It's just to make it pretty. But I knew that. But it was just unfinished." Pierce also acknowledged in his testimony that he knew there was "dirt stored on the side yard." Further, during the escrow, Pierce consulted Derrick Toole, a drainage and grading contractor, whose "scope of work pertained to both sides of the house."

The record establishes the Pierces were advised of the presence of fill dirt which had been stored in the side yard and they conducted their own investigation into the condition of the side yards. Accordingly, their claim Urbinati did not disclose the *quantity* of fill dirt in the side yard is not tenable.

e. *Miscellaneous items*.[7]

(1) *Bees*.

There was no apparent bee problem during escrow. *Nine months* after the close of escrow, the Pierces spent about $2,000 to eradicate a bee hive. The Pierces contended Urbinati failed to disclose the house previously had a bee infestation.

Leaving aside whether Urbinati should have anticipated the property would be afflicted by a future bee problem and therefore should have disclosed the prior infestation, the bee problem was not material as a matter of law. "Whether information 'is of sufficient materiality to affect the value or desirability of the property . . . depends on the facts of the particular case.' [Citation.] Materiality 'is a question of law . . . .' " (*Reed v. King* (1983) 145 Cal.App.3d 261, 265 [seller of house failed to disclose multiple murder on the premises].)

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[7] Pierce concedes these miscellaneous items were not material. At oral argument, Pierce stated these were smaller items, presented to the trier of fact, to show the "modus operandi" of Urbinati, rather than for the damages aspect of the case.

The eradication of the bee problem, at a cost of $2,000, was a de minimis matter, not of sufficient materiality to affect a $2.85 million sale of a 5,900 square foot house.

(2) *Refrigerator*.

The Pierces asserted Urbinati failed to disclose a secondary refrigerator in the pantry was not working. They replaced the refrigerator at a cost of $711.

Leaving aside whether the pantry refrigerator was included in the sale of the property, and whether Urbinati was aware said refrigerator was not working, this item was not a material defect affecting the value and desirability of the property.

(3) *Telephones.*

The Pierces complained of Urbinati's removal of the telephone system from the home.

In fact, Urbinati did not remove the telephone *system*. She merely removed the telephones. As a result, when the Pierces moved in, they had to purchase telephones . They bought four Panasonic telephones, at a cost of $400 each, for a total of $1,600.

Again, leaving aside whether the telephones were included in the sale of the real property, this item was not a material defect affecting the value and desirability of a $2.85 million property.

(4) *Leak in kitchen atrium*.

The Pierces complained Urbinati failed to disclose a leak in the kitchen atrium. The leak was repaired at a cost of $807.

Irrespective of Urbinati's knowledge thereof, this item was not a material defect affecting the value and desirability of the property.

(5) *Kitchen scorch marks.*

The Pierces contended Urbinati "painted over a burned section of wood cabinetry adjacent to the stovetop in the kitchen which remained in a defective and dangerous condition to cover up the scorch mark prior to inspections by Plaintiffs."

The record reflects wood cabinetry adjacent to the stovetop had burn marks and had been painted over. Viau, who inspected the property one year after the closing, testified: "The condition that I observed in the kitchen is there was a large commercial

type stove or oven and stovetop that was installed. And the manufacturer of that stove is Viking. And immediately adjacent to it were cabinets that came – that came up. *And on the cabinets on both sides, there were burn marks on the face frames of the cabinets.* And on the cabinet – if you're facing the stovetop, the cabinet on the right side had been painted over. The existing burn mark had been painted over. And there was a burn mark from a subsequent use." (Italics added.) Viau estimated the cost of repair at $9,676, including removal of the two cabinets on either side of the stove and replacement of the countertops.

Based on Viau's description of the damage as being in plain view, the Pierces could have discovered the burn marks on the face frame of the kitchen cabinets while they were in escrow. Further, the proximity of the wood cabinets to the stove was an issue that could readily be observed. Therefore, said facts either were known to, or were within the reach of the diligent attention and observation of the Pierces. Accordingly, this claim of nondisclosure is untenable. (*Assilzadeh, supra,* 82 Cal.App.4th at p. 410.)

(6) *Fireplaces.*

Lastly, in an attempt to uphold the verdict, the Pierces assert Urbinati falsely reported during escrow that all fireplaces were in good working condition, when in fact two of the fireplaces were not operational.

This assertion, unsupported by any citation to the record, does not warrant any discussion.

4. *Unnecessary to address the Pierces' contentions on cross-appeal.*

Our reversal in favor of Urbinati obviates the need to address the Pierces' contentions regarding the trial court's denial of their post-trial motions for attorney fees and prejudgment interest.[8]

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[8] Urbinati's motion for partial dismissal, filed March 2, 2011, wherein she sought dismissal of the Pierces' appeal from the order denying their motion for attorney fees, is denied as moot.

DISPOSITION

The judgment is reversed with directions to grant Urbinati's motion for JNOV. Urbinati shall recover her costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.