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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DANNY BRYANT et al., Plaintiffs and Appellants, v. WATT COMMUNITIES, INC., Defendant and Respondent.	B234454 (Los Angeles County Super. Ct. No. BC423346)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joanne O'Donnell, Judge. Affirmed.

Law Offices of Ollie P. Manago, Ollie P. Manago and Greta S. Curtis for Plaintiffs and Appellants.

Wood, Smith, Henning & Berman, Daniel A. Berman, Victoria L. Ersoff, and Nicholas M. Gedo for Defendant and Respondent.

Danny and Zelda Bryant[1] appeal from the judgment entered following a jury trial on their breach of contract claim against respondent Watt Communities, Inc. (Watt). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In late 2004, appellants were looking for a new home, so they visited a residential community being built by Watt in Inglewood, California, called Traditions at Renaissance. Zelda met with Ada Wolfe, a representative in Watt's sales office, numerous times between May and October 2005 and explained that appellants wanted a home large enough for Zelda's mother to live with them. Wolfe gave them an options list to choose options such as cabinetry and appliances for the home.

Zelda testified that Wolfe told them they could purchase Lot 20 for $540,000, but they had to wait for it to come up for sale. Zelda offered to make a deposit on the house, but Wolfe said she could not accept it. Appellants chose the options they wanted and returned the options list to Watt in May 2005, writing "Lot 20" on the list.

Wolfe subsequently told Zelda that Lot 20 had been sold because appellants had not returned Wolfe's phone call when she called to tell them the house was available. Zelda testified that when she expressed her disappointment to Wolfe, Wolfe promised to get her another house for the same price.

On October 13, 2005, appellants met with Wolfe and signed a purchase and sales agreement for Lot 92, priced at $685,000. Zelda testified that they asked Wolfe about the price, and she reassured them she would get the price changed for

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[1] Without intending disrespect, we will refer to them by their first names when needed to differentiate between them, but refer to them collectively as appellants.

them. However, Wolfe testified that she told them she did not have the authority to reduce the sales price. According to Zelda, Wolfe explained that the agreement contained an arbitration clause they could rely on if there were any problems with the price.

Appellants did not receive a copy of the purchase agreement because Watt's copy machine was broken. They asked when they could receive a copy, and Wolfe told them to return in a few days to see another sales representative, Barbara Harrison. Appellants gave Wolfe a $10,000 check as an earnest money deposit.

Appellants discussed the options they had chosen, and Wolfe said she had the list they provided in May. Wolfe told appellants to complete the form and return it to Harrison, but she never asked them to leave a deposit for the options.

Zelda returned to Watt's sales office a few days later to get a copy of the purchase agreement, but Harrison did not give it to her. Harrison gave Zelda another option list and had her complete it. Zelda asked if she needed to place a deposit for the options, but Harrison said no. Danny testified that Harrison told appellants that Webb Parker, former vice president of sales for Watt, had instructed her not to give them a copy of the purchase agreement.

Wolfe testified that Danny became belligerent on the telephone with her on October 29, 2005, claiming that she had overcharged him for the house. Danny asked for arbitration to settle the price dispute with Watt and sent a letter the following day requesting arbitration.

In November 2005, appellants attempted to place money in escrow for the house, but the escrow company, Chicago Title Escrow, said that Parker and Watt's general counsel, Christopher Chase, had instructed Chicago Title to cancel escrow because there was no contract.

Chase testified that when Watt received appellants' October 2005 request for arbitration, Parker told Chase he did not want to sell the property to appellants because "[t]his looks like it's a powder keg ready to go off." Chase thought that appellants' request for arbitration indicated uncertainty about whether appellants would honor the purchase agreement. Chase also thought that, even though appellants and Parker had signed the agreement, if Watt could "recall the contract . . . before it was released to [appellants]," no contract would have been formed. Watt asked the escrow company to return the documents to Watt instead of releasing them to appellants, but the company stated that it could not do that.

Chase sent a letter to appellants on November 9, 2005, telling them that arbitration was not appropriate because an arbitrator could not make any decisions regarding the purchase price, and asking for clarification as to whether appellants intended to pay the purchase price. Appellants never confirmed that the purchase price was acceptable, so Chase sent another letter to appellants on November 29, 2005, stating that Watt was going to terminate the purchase agreement.

Watt did not cancel the contract; in February 2006, Chase began corresponding with appellants' counsel, Ollie Manago. Chase reiterated to Manago that the purchase price was not arbitrable and offered appellants the opportunity to terminate the contract and receive their deposit back. Manago replied that appellants would honor the terms of the agreement.

On February 16, 2006, Parker told appellants that Watt was now moving forward with the transaction, but that the options appellants had requested were not available because the house was completely finished. Zelda testified that Parker admitted during the telephone call that he had prevented appellants from paying for and selecting options in October 2005.

In October 2009, appellants filed a complaint alleging two causes of action for breach of written contract by Watt. In the first cause of action, the complaint alleged that Watt breached the written contract by refusing to allow appellants to select improvements, use their own loan broker, pay cash for the property, and resolve a problem with flies and manure. The second cause of action alleged that Watt breached the written contract by refusing to allow appellants to purchase Lot 20, "which was an amendment to the contract based on the parol statements of WOLFE."

A first amended complaint, filed on April 1, 2010, asserted only one cause of action. The amended complaint retained the first cause of action, alleging that Watt breached the written contract by refusing to allow appellants to select improvements, use their own loan broker, pay cash for the property, and resolve a problem with flies and manure, but the second cause of action regarding Lot 20 was removed.

Following a jury trial, judgment was entered in favor of Watt and against appellants. Appellants filed this appeal.

DISCUSSION

Appellants challenge the judgment on numerous grounds. We find their claims unmeritorious and so affirm.

I. *Ineffective Assistance of Counsel*

Appellants' first claim, ineffective assistance of prior counsel, fails because the right to effective assistance of counsel is a right guaranteed to criminal defendants "[u]nder both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution." (*People v. Ledesma*

(1987) 43 Cal.3d 171, 215; see also *Cuyler v. Sullivan* (1980) 446 U.S. 335, 344-345.) The principle does not apply in the civil context.

II. *Extension of Discovery*

Appellants' second claim is that the trial court abused its discretion in denying their ex parte application for an extension of the discovery cutoff. "The standard of review for a discovery order is abuse of discretion. [Citation.] 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citation.]" (*Bank of America, N.A. v. Superior Court of Orange County* (2013) 212 Cal.App.4th 1076, 1089.)

On December 2, 2010, appellants' former counsel filed a motion to withdraw as attorney of record based on an "irremedial breakdown in the attorney-client relationship." Appellants' new counsel, Brandon Tesser, filed a substitution of attorney form on February 28, 2011.

On March 8, 2011, Tesser filed an ex parte application to change the date of the hearing on Watt's summary judgment motion and to extend the March 28, 2011 discovery cutoff date. Tesser asserted that prior counsel had conducted no discovery, so he needed to conduct discovery and take depositions from former employees such as Wolfe and Parker.

The trial court denied appellants' ex parte application to extend the discovery cutoff in a March 8, 2011 minute order. The court found that Tesser's claim that appellants' former counsel did not conduct adequate discovery did not constitute good cause to extend the date, in particular because the case had been pending since October 2009.

The court's reasoning is sound and supported by the record. That no discovery had been performed for more than a year was not good cause to extend the discovery cutoff. In any event, appellants fail to articulate precisely how they were prejudiced by the failure to extend discovery other than to assert they were denied a fair trial. Such a bare assertion is insufficient in itself to show prejudice.

III. *Motion in Limine Number 2*

Appellants' third claim is that the trial court abused its discretion in granting Watt's motion in limine number 2. We review the trial court's ruling on a motion in limine for abuse of discretion. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1493.) A trial court does not abuse its discretion unless it acts in an arbitrary, capricious or patently absurd manner. (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1419.)

Watt filed 11 motions in limine. The motion challenged by appellants sought to exclude any evidence regarding appellants' alleged attempt to purchase Lot 20. However, appellants state that Watt's counsel subsequently waived the ruling on the motion in limine in order to examine witnesses about the dispute regarding Lot 20.

The record indicates that Zelda did testify about the dispute regarding Lot 20. She testified that she and Danny told Wolfe they wanted Lot 20 and were disappointed when it was sold to someone else, and that Wolfe promised to give them a comparable house at the same price. Although appellants contend that relevant evidence should not have been excluded, they do not indicate what evidence regarding Lot 20 they were not allowed to present.

Appellants' contention that they were not allowed to testify about "price, fraud, misrepresentations, puffing, and many other violations" is not supported by the record. As stated above, Zelda testified about Wolfe's alleged promises regarding the purchase price and her alleged failure to follow through with those promises. Appellants have not pointed to any specific evidence they were not allowed to present.[2] Thus, their claim that the trial court's ruling on the motion in limine prejudiced their case finds no support in the record.

IV. *Jury Instructions*

Appellants challenge the jury instructions on two grounds. They contend that the trial court erred in failing to include an instruction about the failure to arbitrate and an instruction on anticipatory breach.

A. *Instruction on Arbitration*

"'"The propriety of jury instructions is a question of law that we review de novo. [Citation.]" [Citation.]' [Citation.]" (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 845.)

"A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' [Citation.] . . . [¶] Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' [Citations.] Of course, that determination depends heavily on the particular nature of the error,

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[2] In addition to the fact that appellants have not indicated what evidence they were not allowed to present, we note that appellants removed the allegations regarding Lot 20 when they amended their complaint.

including its natural and probable effect on a party's ability to place his full case before the jury.

"But the analysis cannot stop there. Actual prejudice must be assessed in the context of the individual trial record. . . . Thus, when deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580-581.)

"'With respect to our review of issues relating to [the failure to give requested jury instructions], as well as the question of their prejudicial impact, we do not view the evidence in the light most favorable to the successful [party] and draw all inferences in favor of the judgment. Rather, we must assume that the jury, had it been given proper instructions, might have drawn different inferences more favorable to the losing [party] and rendered a verdict in [that party's] favor on those issues as to which it was misdirected. [Citations.]' [Citation.]" (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 655.)

Appellants contend the trial court should have allowed a jury instruction on whether the right to arbitration was a contract term and whether Watt's failure to arbitrate constituted a breach of contract.[3] The trial court rejected appellants' breach of contract instruction, which stated, in part, that Watt breached the contract by "[r]efusing to arbitrate the dispute with [appellants] regarding the price of the real property." The court stated that, although appellants may have requested

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[3] Watt states that the court actually rejected a special interrogatory, not a jury instruction, regarding arbitration. The transcript indicates that the court and parties were discussing CACI No. 300, a breach of contract instruction that included the refusal to arbitrate. The court was examining the CACI No. 300 form submitted by Watt, which the parties conceded was substantially similar to the form submitted by appellants.

arbitration, "that's not what this trial has been about, and . . . the request for arbitration didn't have anything to do with the breach of the contract."

The trial court did not err in refusing appellants' arbitration instruction. There was evidence presented at trial regarding the arbitration clause, appellants' requests for arbitration and Watt's alleged refusal to arbitrate. However, the amended complaint alleged that Watt "denied [appellants] arbitration," but only in the context of alleging that appellants did not waive their claims by refusing to rescind the contract because they sought but were refused arbitration. The complaint did not allege that Watt breached the contract by refusing arbitration but "by refusing to allow the selection of improvements by [appellants], refusing to allow [appellants] to use their own loan broker, refusing to allow [appellants] to pay cash for the property, and refusing to resolve the flies and manure problem." The trial court therefore correctly denied appellants' request for a jury instruction regarding Watt's alleged refusal to arbitrate.[4]

B. *Instruction on Anticipatory Breach*

Appellants also contend that the trial court erred by failing to instruct the jury on anticipatory breach. Appellants submitted a jury instruction on anticipatory breach, but the transcript appellants cite to support the contention that the court erred indicates that appellants did not object to the court's decision to exclude an instruction on anticipatory breach. In fact, it was counsel for Watt who

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[4] Even if we assume that the trial court erred in failing to include a jury instruction about arbitration, the record indicates that the error, if any, did not result in a miscarriage of justice. The judgment on special verdicts reveals that the jury found that appellants entered into a contract for Lot 92 with Watt, but that appellants did not do all of the significant things the purchase agreement required them to do. Thus, even if the jury had received an arbitration instruction, the record does not indicate that a verdict would have been rendered in appellants' favor.

agreed to delete the instruction when the court questioned the propriety of the anticipatory breach instruction. After Watt's counsel agreed to delete the reference to anticipatory breach, the court asked appellants' counsel if he had any other concerns about the jury instructions, but he did not.

Appellants do not contend the instructions were erroneous other than the failure to include these two instructions. "'A failure to object to civil jury instructions will not be deemed a waiver where the instruction is prejudicially erroneous as given, that is, which is an incorrect statement of the law. On the other hand, a jury instruction which is incomplete or too general must be accompanied by an objection or qualifying instruction to avoid the doctrine of waiver. [Citation.]' [Citation.]" (*Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 Cal.App.4th 281, 296-297.) Appellants neither objected to the trial court's decision not to give the anticipatory breach instruction nor offered their own such instruction. Therefore, they have forfeited the issue.

V. *Judicial Bias*

Appellants' final contention is that the trial judge was biased against them. Appellants' judicial bias claim is based on the contention that the judge "was in a hurry to have the trial over," was "impatient with Appellants and their counsel," and "injected her own objections." As an example of the court's impatience, appellants point to the court's comment that the trial was "taking too long. It's too repetitive, and we are not going to hear all this again from Mrs. Bryant." The court also told appellants' counsel not to spend so much time on testimony about arbitration. In addition, the court told appellants' counsel, "I'm hoping there's not going to be a rebuttal case. . . . I'll need to hear pretty good arguments for why it's necessary. There's been a lot of evidence." Appellants also cite as an example of

judicial bias the court's ruling disallowing them to call attorney Ollie Manago as a rebuttal witness to allegedly improper expert testimony by Chase.

The trial court has the duty to exercise "reasonable control of the trial. [Citations.]" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1108.) The trial judge's alleged "impatience" was more accurately simply an attempt to maintain control of the proceedings. This case does not present a record in which "'the appearance of judicial bias and unfairness colors the entire record.'" (*Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, 1008.)

Appellants have not demonstrated that the judge engaged in "any judicial misconduct or bias, let alone misconduct or bias that was so prejudicial" as to deprive them of a fair trial. (*People v. Farley* (2009) 46 Cal.4th 1053, 1110.) We therefore reject their claim of judicial bias.

DISPOSITION

The judgment is affirmed. Respondent is entitled to recover costs on appeal.

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WILLHITE, J.

We concur:

EPSTEIN, P. J. MANELLA, J.