Filed 2/28/12 Woodruff v. Bekeris CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DENNIS WOODRUFF, Plaintiff and Respondent, v. RAYMOND BEKERIS, Defendant and Appellant.	B233470 (Los Angeles County Super. Ct. No. SC104183)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig D. Karlan, Judge. Affirmed.

Raymond Bekeris, in pro. per., for Defendant and Appellant.

Law Offices of F. James Feffer, F. James Feffer for Plaintiff and Respondent.

Defendant and appellant Raymond Bekeris appeals from the judgment entered against him, on plaintiff and respondent Dennis Woodruff's complaint. We affirm.

Facts

Appellant is a real estate broker, and the case concerns his promise, or alleged promise, to pay Woodruff a percentage of his commission on sales of two properties, one in Beverly Hills and one in Santa Barbara. Only a portion of the complaint is found in our record, but the special verdicts establish that the causes of action were breach of contract, money had and received, goods and services rendered, and fraud.

On those special verdicts, the jury found for appellant on the causes of action for breach of contract and money had and received, and found for Woodruff on the cause of action for goods and services rendered and the cause of action for fraud. The jury awarded Woodruff $50,000 in damages. The special verdicts did not ask the jury to attribute the damages to a cause of action, the parties having agreed that the damages would be the same for each cause of action.

The Beverly Hills Property

In brief, the evidence was: Woodruff's friend Geoffrey Seymour was a representative of a family trust which owned real property in Beverly Hills. The trust wanted to sell and at some point in 2004, Seymour put up for-sale-by-owner signs. Woodruff assisted Seymour in his attempts to sell the property. Among other things, Woodruff supervised or conducted repairs and showed the property to prospective buyers.

The trust ultimately decided to list the property through a broker. Appellant, who owns a business called John Bruce Nelson and Associates,[1] sought the listing, as did many other brokers. Seymour and Woodruff testified that Woodruff screened brokers for

---

[1] Appellant testified that John Bruce Nelson and Associates is a partnership. The partnership was named as a defendant, apparently on all causes of action except the cause of action for fraud, and prevailed on all causes of action.

Seymour, that it was at Woodruff's request that Seymour met with appellant and considered him for the listing, and that Seymour and Woodruff selected three brokers, including appellant, to present to the trust.

Woodruff testified that "I was the one that got [appellant] in the door and got the deal for him," and that "I was the one making the choices." Woodruff also testified that before appellant obtained the listing, he agreed to pay Woodruff 30 percent of his commission, after learning that other brokers had offered to pay 25 percent, and that appellant made the offer in order to get the listing.

In February 2005, the trust listed the property with John Bruce Nelson, for a five percent commission. The listing agreement provided that the commission might be split with a buyer's broker.

At Woodruff's request, appellant put the 30 percent agreement into writing. The letter is not in our record, but a portion was read at trial: "Per our conversation at the property yesterday with the owner present you will receive 30 percent of our commission as the exclusive listing broker on the property." Appellant testified that "our" referred to himself and two agents who worked with John Bruce Nelson, Josh Flagg and Aiton Segal. They were, in appellant's view, listing agents on the property.

Woodruff also testified that the house was in terrible condition when it was first put on the market, and that he had substantial responsibility for the repairs. While the property was for sale, he painted, supervised repairs, gave tours of the house to potential buyers at appellant's request, and performed other tasks. He testified that during this period, appellant repeatedly assured him that he would get 30 percent of whatever John Bruce Nelson got, and might also get a bonus.

The Beverly Hills property sold for $5.6 million, apparently in October of 2005. Appellant also represented the buyer. Escrow documents showed a commission to John Bruce Nelson of $280,000.

Woodruff believed that appellant owed him $84,000, that is, 30 percent of the $280,000. In fact, appellant paid him only $47,000. Woodruff testified that when he got the check for $47,000, he contacted appellant, who promised to pay the remainder.

Woodruff's understanding was that he would be paid 30 percent "of the whole pie," that is, of the entire commission. On questioning by the court, he testified that if a different broker had represented the buyer, he would have expected to receive only 30 percent of the listing broker's commission. However, given that appellant represented both parties, Woodruff believed that the agreement was that he would be paid 30 percent of the total commission.

Appellant produced evidence that, per his instructions, escrow disbursed $150,000 of the commission to the buyer as a credit. His position was that he received only $130,000 as listing broker, and that under his agreement with Woodruff, he owed Woodruff 30 percent of that sum. He denied having had any conversation promising Woodruff more than that, though in fact, he paid Woodruff more than 30 percent of the $130,000. He did so in recognition of the fact that the two other John Bruce Nelson agents who worked on the transaction were being compensated, one at $47,000 and one at $28,000, and because Woodruff asked for more money.

Through expert witnesses, appellant produced evidence that "if a listing broker and a [buyer's] broker wound up being the same person," it would "still be described as two separate commissions."

Appellant also testified that no significant work was done to improve the property while it was for sale. Woodruff did a little painting and fed the koi, but that was all.

The Santa Barbara Property

The trust also owned real property in Santa Barbara. At the time the Beverly Hills house was listed, a family member lived in the Santa Barbara house, but the trust was interested in selling at some point in the future. There was evidence that appellant was aware of this fact while the Beverly Hills property was for sale.

The trust made the decision to sell the Santa Barbara property in June of 2006. In July of 2006, John Bruce Nelson became the listing broker on the Santa Barbara property.

Woodruff testified that he believed that the letter agreement applied to the Santa Barbara property, too. Both Woodruff and Seymour testified that a few weeks after the Beverly Hills property closed, Josh Flagg of John Bruce Nelson told Woodruff and Seymour that if John Bruce Nelson was the listing agent on the Santa Barbara property, Woodruff would receive 30 percent of that commission. Woodruff testified that Flagg said that appellant knew of this arrangement and had agreed to it. Woodruff also testified that in many conversations, appellant promised to pay Woodruff 30 percent of his commission on the Santa Barbara property. Woodruff asked appellant to put it in writing, but appellant refused.

Woodruff testified that he wanted appellant to be the broker on the Santa Barbara property, and that he exerted his influence on the family to make that happen, because it was the best chance he had of being fully paid on the Beverly Hills property. He testified that he was extremely influential in having John Bruce Nelson chosen as the broker for the Santa Barbara property.

The Santa Barbara property was on the market for a year and a half. Appellant and Woodruff both testified that Woodruff went to the property every weekend to put up the open house signs. Woodruff testified that he also showed the property, acted as caretaker, and handed out flyers.

The property sold for $2 million dollars, resulting in a $110,000 commission. Another John Bruce Nelson agent represented the buyer. Appellant instructed escrow to pay Woodruff $20,000. The remainder was split between himself and the agent who represented the buyer.

Thirty percent of $110,000 is $33,000, and Woodruff believed that he was owed an additional $13,000.

Appellant testified that he had never agreed to pay Woodruff a percentage of the commission on the sale of the Santa Barbara property, but instead told Woodruff that he

could not make an agreement concerning the Santa Barbara property. He paid Woodruff the $20,000 in recognition of work Woodruff did in connection with the sale of the property.

In closing argument, Woodruff's fraud argument was that appellant deliberately made the letter agreement ambiguous, so that Woodruff believed that it was a promise to pay 30 percent of the full commission, not just the seller's side, that appellant never intended to pay the full 30 percent, and that appellant also committed fraud through oral promises to complete the payment on the Beverly Hills commission, and with respect to the Santa Barbara property. Woodruff sought damages of $50,000.

Discussion

Appellant first contends that the fraud verdict was not supported by the evidence.[2] He argues that the evidence was that he only received $240,000 in commissions on the two properties, that 30 percent of that sum is $72,000, and that the evidence was that he paid Woodruff $67,000, so that he owed at most $5,000.

Further, in appellant's view, Woodruff's testimony was that appellant's oral promises were that Woodruff would get 30 percent "of what [appellant] got," again supporting a verdict in appellant's favor. Appellant cites Woodruff's testimony that appellant said that Woodruff "might" get a bonus on the Beverly Hills property, and what appellant sees as the lack of testimony from Woodruff that appellant specifically said that Woodruff would receive 30 percent of the selling side commission *and* 30 percent of the buying side commission. Appellant argues that his intent was to pay only a percentage of what he received by representing the seller, and that he never said anything to the

---

[2] He at time phrases the argument as an argument that "the damages are inappropriate," causing Woodruff to cite the rule that a failure to move for a new trial precludes a party from complaining on appeal that the damages are excessive. (*Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719.) We do not see, however, that the argument truly concerns excessive damages. Instead, appellant challenges the sufficiency of the evidence, and makes related legal arguments.

contrary to Woodruff. From all of this, appellant concludes that the evidence did not support the judgment.

"In reviewing the sufficiency of the evidence to support a verdict, the test to be applied by the appellate court is whether or not there is any substantial evidence to support the findings of the jury. All questions of the weight of the evidence and the credibility of the witnesses are for the jury, and if there is any substantial evidence to support the verdict it cannot be set aside by the reviewing court, although such court may believe that the preponderance of the evidence was the other way. [Citations.] The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion of the trier of fact. All conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged to uphold the verdict if possible. When two or more inferences reasonably can be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (*Tidlund v. Seven Up Bottling Co*. (1957) 154 Cal.App.2d 663, 665-666.)[3]

Here, the jury weighed the competing evidence and found fraud. Appellant's arguments essentially ask us to reweigh the evidence, something we may not do.

Nor are we persuaded by appellant's next argument. Appellant cites *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, for the proposition that "In California a defrauded

---

[3] Appellant argues that a different rule applies, and that "if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing." (*Ryder v. Bamberger* (1916) 172 Cal. 791, 799-800.) In appellant's view, this rule means that we must interpret the facts to conclude that there was no fraud. *Ryder* considered a challenge to trial court findings against a plaintiff charging fraud. On appeal, the plaintiff argued that fraud "must be inferred from the admitted facts," (*id*. at p. 800), an argument with which the Supreme Court disagreed. Nothing in *Ryder* allows us to reweigh the evidence. Instead, the case holds that "it is the especial right of every litigant to have all facts so determined by court or jury, this court sitting only to review the findings and being empowered to set them aside as matter of law only when not sustained by adequate evidence." (*Id*. at p. 799.)

party is ordinarily limited to recovering his 'out-of-pocket' loss, i.e., the difference between the value with which he parted and the value he received. [Citation.]" (*Id*. at p. 53.) Appellant then cites the evidence that other brokers offered Woodruff 20 or 25 percent of their commissions, and concludes that Woodruff was only entitled to the difference between what he received from appellant and what he would have received if another broker had listed the property and shared less of the commission.

As Woodruff argues, the out-of-pocket rule is not applicable. "There are two measures of damages for fraud: out-of-pocket and benefit of the bargain. [Citation.] The 'out-of-pocket' measure of damages 'is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The "benefit-of-the-bargain" measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.' [Citation.]" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240.) The out-of-pocket measure applies to "One defrauded in the purchase, sale or exchange of property . . . ." (Civ. Code, § 3343.) That was not Woodruff's claim here, and contrary to the suggestion in appellant's brief, we cannot see that the parties here agreed to an out-of-pocket measure of damages.

It is also true that the jury found for Woodruff on the cause of action for goods and services rendered, a finding which appellant does not challenge on appeal. Thus, even if there were insufficient evidence for the finding of fraud, the judgment for $50,000 would stand.

Finally, appellant argues that the fraud claim is barred due to a judicial admission by Woodruff's attorney. These are the facts: during oral argument on a motion for summary judgment, Woodruff's counsel said, "one of the positions that the defense has

taken in this is that [Woodruff] is not entitled to payment based upon the fact that he's not a realtor. He's not a broker. And if, in fact, this is the position that they take at the time of trial, and, in fact, that's what they believed at the time they induced [Woodruff] to enter into this agreement, that would be fraud. That, in essence, is where the fraud allegations come from."

Appellant argues that this is a judicial admission, and that the admission limited Woodruff's fraud claim. He argues that based on this admission, he abandoned the defense of the fraud claim and also argues that the admission led the trial court to exclude evidence not related to the breach of contract claim and to erroneously inform the jury (in response to the jury's question) that there could be fraud even if there was no breach of contract. In support, appellant cites Civil Code section 1624, the statute of frauds, and also cites the statute of limitations for fraud. (Code Civ. Proc., § 338.)

We see no judicial admission. Instead, Woodruff's counsel was discussing a defense theory, which, as it happened, was not a theory that the defense advanced at trial. We can see no error in the evidentiary rulings which appellant cites, and indeed cannot see that those rulings were influenced by the statement of Woodruff's counsel at oral argument on summary judgment. We say the same about the alleged error in answering the jury's question.

Disposition

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

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P. J.

We concur:

MOSK, J. KRIEGLER, J.