Filed 4/26/18 Dumas v. Wells 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

JOSE DUMAS, Plaintiff and Respondent, v. ANTHONY WELLS, Defendant and Appellant.	B270159 (Los Angeles County Super. Ct. No. BC451348)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ernest M. Hiroshige, Judge. Affirmed as modified.

Law Offices of Gary A. Laff and Gary A. Laff, for Defendant and Appellant.

John Clark Brown, Jr., for Plaintiff and Respondent.

Defendant and appellant Anthony Wells appeals from a judgment in favor of plaintiff and respondent Jose Dumas in this action arising from a failed real estate transaction and business loan. Wells contends the judgment must be reversed because (1) there is no substantial evidence to support a finding of promissory fraud or fraud under Civil Code section 1572, subdivision 5;[1] (2) there is no substantial evidence of a civil conspiracy to commit fraud; and (3) Dumas acted with unclean hands and an illegality of purpose. We modify the judgment to reduce the amount in damages awarded to Dumas, and affirm the judgment as modified.

FACTS

Dumas and Wells have been friends since 1989. In 2007, Dumas decided to sell his real property located in Temecula, California. Wells offered to buy the Temecula property, through Chartex, a company owned by Wells and non-party Anthony Liberatore. Wells would be assisted in the transaction by his "broker," Franklin Palm. Wells told Dumas that Chartex was "making quite a bit of money" importing and exporting machinery. Wells failed to disclose to Dumas that Chartex never made a profit and had no assets except what was in its bank account.

---

[1] All further statutory references are to the Civil Code unless otherwise indicated.

The Temecula Property Transaction

Following discussions into late 2007, Wells told Dumas that Gary Nishida, his "partner in Chartex" who he knew for over 28 years, would buy the Temecula property. Wells stated that Nishida would purchase the property because Wells had poor credit.

Dumas sought $1,400,000 for the Temecula property. Wells agreed, but later requested a $1,100,000 sales price in escrow and a $300,000 carryback loan to account for the difference.[2]

Wells told Dumas that Nishida would take out a purchase money loan, which would be secured by a first deed of trust on the property. Nishida would then execute a note for $300,000, which would be secured by a second deed of trust on the property. Nishida would make payments on the mortgage and the $300,000 note, and would sign all documents necessary to purchase the property.

Wells told Dumas not to worry about payments because Nishida had "a lot of money," made $15,000 per month, and owned a $2 million house. Dumas agreed to the deal based upon Wells' representations. Dumas trusted Wells because they "knew each other for many years."

---

[2] A "carryback" loan refers to a transaction in which a seller partially finances the purchase price of a real estate transaction by drawing a promissory note and a deed of trust securing the note. Upon closing, the deed of trust is recorded and the promissory note in favor of the seller is delivered.

Subsequent Business Loan

Prior to the close of escrow, Wells asked Dumas for an additional $300,000 business loan. Dumas agreed to lend the additional funds to Wells and Nishida, provided that the loan would be secured by a lien on Nishida's house. The parties agreed and executed a single $600,000 note, which represented the carryback loan and business loan. Wells reiterated that Nishida would repay the note. In accordance with Wells' explanation, Dumas understood that he would fund the $300,000 business loan from the escrow proceeds.

Wells' Discussions with Nishida

Contrary to what Wells told Dumas, Nishida had no relation to Chartex. Wells approached Nishida about the Temecula property so that Wells could grow his own business. Wells explained that Nishida would sign documents necessary to obtain financing on the property, and that Wells and Chartex would pay the mortgage and the note. Nishida never agreed to make any payments.

Wells did not disclose to Dumas that Nishida had not agreed to make payments on the Temecula property or the note. Dumas would not have entered into negotiations to sell the Temecula property or lend money if Wells had disclosed these facts to him.

Disbursements Out of Escrow

Defendant Wei Houng,[3] in his capacity as a loan originator at Countrywide Home Loans, Inc. (Countrywide), contacted Palm, Wells, and Nishida to compile information for the purchase money loan application. To assist in the transaction, Wells handled all necessary escrow documents and would take them to Nishida to sign.

Dumas was due $1,429,533.73 from the proceeds of the sale of the Temecula property and the $600,000 note. After deduction of closing costs and payment of any liens on record, Dumas expected to receive $829,533.73. Houng prepared and presented closing documents to Countrywide reflecting these terms. Sometime thereafter, Houng "submitted" amended escrow instructions. The amended instructions purported to bear the signature of Nishida, but they were not actually signed by him.

Under the amended instructions, $500,000 that was due to Dumas was debited to Nishida. From this debit, the escrow agent wired $474,217.15 to World Enterprise Investments (World), a company owned by Houng. The escrow agent was not aware of the carryback or business loans, so the agent surmised from the amended instructions that Nishida was due $600,000 less costs from the escrow

---

[3] Houng was initially a party to this appeal but was dismissed December 12, 2017. (See California Rules of Court, rule 8.220(a)(1).)

funds. Dumas never knew of an amended escrow instruction directing a wire of money to World.

World received $474,217.15 after the close of escrow. Pursuant to separate instructions prepared by Palm, Houng disbursed the balance by separate checks to Nishida, Liberatore, Chartex, and a company solely owned by Palm.

When Dumas saw the closing statement, he assumed the business loan was paid through the $500,000 debit, so he concluded his total payment was short $200,000. He contacted Wells and told him he was due $200,000 from escrow. Wells told Dumas there "had been a mistake" and that Palm would take care of it.

Following the call, Dumas, Wells, and Houng met to discuss substituting Dumas' liens on the Temecula property and Nishida's home with a lien on Houng's parents' property. Dumas refused.

Only three months of mortgage payments were made on the Temecula property from a joint account held between Wells and Nishida. Countrywide foreclosed on the Temecula property when no further payments were made on the mortgage and note. Dumas foreclosed on Nishida's home, receiving $295,310 from the foreclosure.

PROCEDURAL HISTORY

Dumas filed the operative complaint seeking damages for fraud and promissory fraud against Wells and Houng. Following a bench trial, the trial court issued a tentative

decision. Wells objected to the tentative decision, and the trial court issued a first amended statement of decision.

The court awarded Dumas $1,485,603.24 in compensatory damages. The court found that Wells and Houng committed fraud pursuant to section 1572, subdivision 5, because they acted as "each other's principals, agents and co-conspirators" and carried out a plan to steal the property and money due Dumas from the sale of the property, "all of which they concealed from Dumas." Wells committed promissory fraud because he "induced" Dumas to enter into the transaction by making false representations. Dumas relied on the representations because they were long-time friends. Wells had no intention of making the payments on the property through Nishida or Chartex. Chartex had no money in its bank accounts, had no assets, did almost no business, and handed over control to Palm, who designed and implemented the loan scheme and theft. Wells filed a timely notice of appeal.

DISCUSSION

Standard of Review

"In reviewing a judgment based upon a statement of decision following a bench trial, . . . [w]e apply a substantial evidence standard of review to the trial court's findings of fact. [Citation.] Under this deferential standard of review, findings of fact are liberally construed to support the

judgment and we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 (*Thompson*).) "An appellant challenging the sufficiency of the evidence to support the judgment must cite the evidence in the record supporting the judgment and explain why such evidence is insufficient as a matter of law. [Citations.] An appellant who fails to cite and discuss the evidence supporting the judgment cannot demonstrate that such evidence is insufficient. The fact that there was substantial evidence in the record to support a contrary finding does not compel the conclusion that there was no substantial evidence to support the judgment. An appellant . . . who cites and discusses only evidence in her favor fails to demonstrate any error and waives the contention that the evidence is insufficient to support the judgment. [Citations.]" (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1408.)

"A single witness's testimony may constitute substantial evidence to support a finding. [Citation.] It is not our role as a reviewing court to reweigh the evidence or to assess witness credibility. [Citation.] 'A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.' [Citation.] Specifically, '[u]nder the doctrine of implied findings, the reviewing court must infer, following a bench trial, that the trial court impliedly made

every factual finding necessary to support its decision.' [Citation.]" (*Thompson*, *supra*, 6 Cal.App.5th at p. 981.)

Liability for Fraud and Promissory Fraud

A fraudulent representation need not be an affirmative assertion, but may consist of "[a]ny other act fitted to deceive." (§ 1572, subd. 5.) Put another way, fraud may be found for "any other conduct that amounts to an assertion not in accordance with the truth." (Rest.2d Torts, § 525, com. b, p. 56; see *State ex rel. Wilson v. Superior Court* (2014) 227 Cal.App.4th 579, 602 ["An action for fraud . . . will lie . . . for the 'suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact"].)

"'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*); see §§ 1572, subd. 4, 1710, subd. 4.)

The elements of a fraud cause of action are (a) a false representation, concealment, or nondisclosure; (b) knowledge of falsity;[4] (c) intent to defraud; (d) justifiable reliance; and

[4] Wells makes no reasoned legal argument regarding knowledge of falsity in his opening brief, and fails to identify

(e) resulting damage. (*Lazar*, *supra*, 12 Cal.4th at p. 638; *McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 792; *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845.)

False Representations and Concealment

Wells contends his representations to Dumas were either true or constituted nonactionable opinions. We disagree.

"'It is hornbook law that an actionable misrepresentation must be made about past or existing facts; statements regarding future events are merely deemed opinions.' [Citations.]" (*Public Employees' Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 662.) However, when a statement of opinion is not a casual expression of belief, but instead a deliberate affirmation of the matter stated, it may be considered a positive assertion of fact. (*Ibid.*) "'Moreover, when a party possesses or holds itself out as possessing superior knowledge or special information or expertise

---

evidence and its place in the record in support of his arguments in his reply brief. We treat the point as waived. (*Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1292, fn. 6 ["Arguments presented for the first time in an appellant's reply brief are considered waived"]; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 ["If no citation 'is furnished on a particular point, the court may treat it as waived'"].)

regarding the subject matter and a plaintiff is so situated that it may reasonably rely on such supposed knowledge, information, or expertise, the defendant's representation may be treated as one of material fact. [Citations.]" (*Ibid.*)

Substantial evidence supports a finding that Wells made false representations to induce Dumas to enter into the sale and loan agreements. To assuage Dumas' concerns that he was entering into a costly transaction with a friend with poor credit and an unfamiliar company, Wells falsely stated that Chartex was "making a lot of money," and that Nishida, who Wells falsely held out as a partner in Chartex, would purchase the property and would make payments. On the other side of the transactions, Wells told Nishida that he and Chartex would make the payments. Such differing proclamations support the finding that Wells had no intention of making payments on the property through Nishida or Chartex.

Substantial evidence also supports a finding that Wells committed acts that were "fitted to deceive" Dumas by concealing the scheme to transfer money out of escrow. Under section 1572, subdivision 5, submitting false affidavits or suppressing material facts to a transaction constitutes fraudulent conduct "fitted to deceive." (See *Agricultural Ins. Co. v. Superior Court* (1999) 70 Cal.App.4th 385, 401–403) [insurer sufficiently pled fraud against insured for submitting false claims]; *Architects & Contractors Estimating Services, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1008 [consent obtained by submission of a

contract suppressing fact that required work was not included was "'fitted to deceive"']; *Wells v. Zenz* (1927) 83 Cal.App. 137, 141 ["fraud may be committed by the suppression of the truth as well as by the suggestion of [a] falsehood"].) The forged escrow documents in this case effectuated the fraudulent transfer of escrow funds. Wells was responsible for handling these documents, and he communicated with Palm and Houng throughout the transaction. It was reasonable for the court to infer that Wells knew of, and was actively involved in, the fraudulent scheme. By concealing this from Dumas, Wells' conduct was sufficiently "fitted to deceive."

Intent to Defraud

Wells asks this court to overturn the trial court's determination that he had fraudulent intent. This we cannot do. "'"[S]omething more than nonperformance is required to prove the defendant's intent not to perform his promise." [Citations.] To be sure, fraudulent intent must often be established by circumstantial evidence. . . .'" (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn* (2013) 55 Cal.4th 1169, 1183, quoting *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30–31.)

Ample circumstantial evidence provides the necessary proof that Wells acted with fraudulent intent for both causes of action. As to promissory fraud, because "'the representations were made prior to the transaction and

directly related to it, it must be presumed that they were made for the purpose and with the design of inducing plaintiff[] to enter into the contract.' [Citation.]" (*Jarvis v. Singleton* (1933) 129 Cal.App. 250, 253.) As to concealing the scheme from Dumas, the record reveals an "intent to *induce conduct*—action or inaction—that differs from what the plaintiff would have done if informed of the concealed fact." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 869.)

Justifiable Reliance

Substantial evidence also supports the finding that Dumas "actually and reasonably"[5] relied on Wells' misrepresentations and concealment. (*Manson v. Reed* (1986) 186 Cal.App.3d 1493, 1504.) Actual reliance occurs when the misrepresentation is an immediate cause of a plaintiff's conduct. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1256.) ""It is enough that

---

[5] Wells separately contends, without citation to authority, that the court erred because Dumas failed to present evidence that "he detrimentally relied upon a false promise." When an appellant raises an issue "but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785; see *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [appellate court not required to consider points not supported by citation to authorities].)

the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.'" [Citation.]" (*Ibid.*)

"[W]hether reliance is reasonable in an *intentional* fraud case is not tested against the 'standard of precaution or of minimum knowledge of a hypothetical, reasonable man.' [Citation.] [¶] 'Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. . . . If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery.'" (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1666–1667, quoting *Seeger v. Odell* (1941) 18 Cal.2d 409, 415.)

In this case, Dumas would not have entered into the property transaction if he knew the truth about Chartex and Nishida. It is true that Dumas did not inquire into "the credit, finances, assets, or accuracy of Nishida's financial condition," but understandably so in light of the representations of Wells, who held a position of trust with Dumas. The two were longtime friends, and the trial court could reasonably find that Dumas' reliance on Wells' statements was not manifestly unreasonable.

Nor can we say that Dumas was unjustified in relying on Wells' fraudulent concealment. "'Reliance can be proved in a fraudulent omission case by establishing that "had the omitted information been disclosed, [the plaintiff] would

have been aware of it and behaved differently." [Citation.]' [Citation.]" (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1193–1194.) Certainly, had Dumas known the truth about Chartex and Nishida, he would not have entered into either transaction.

Because substantial evidence supports the trial court's finding of liability for fraud based on Wells' own conduct, we need not address his challenge to the sufficiency of the evidence based on theories of civil conspiracy, agency, and alter ego.

Unclean Hands

Wells contends Dumas' action should have been barred by the doctrines of unclean hands and illegality of purpose, because Dumas "knowingly submitted false information about the sale[s] price to Countrywide." Wells presents the illegality of purpose defense for the first time on appeal, so the court will not consider it. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847 ["appellate effort is contrary to the rule that parties are not permitted to "'adopt a new and different theory on appeal'"']

"We review the trial court's decision to apply [defendant's] unclean hands defense for abuse of discretion. (*Farahani v. San Diego Community College Dist.* (2009) 175 Cal.App.4th 1486, 1495 [].)" (*Aguayo v. Amaro* (2013) 213 Cal.App.4th 1102, 1109.) Unclean hands "requires inequitable conduct by the plaintiff in connection with the

matter in controversy and provides a complete defense to the plaintiff's action. [Citations.]" (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 446 (*Pole*).) "The defense of unclean hands does not apply in every instance where the plaintiff has committed some misconduct in connection with the matter in controversy, but applies only where it would be inequitable to grant the plaintiff *any* relief. [Citation.] . . . Whether the defense applies in particular circumstances depends on the analogous case law, the nature of the misconduct, and the relationship of the misconduct to the claimed injuries." (*Id.* at pp. 446–447.)

The trial court made no such finding that Dumas engaged in misconduct when the parties submitted information to obtain a purchase money loan on the Temecula property. We refuse to reweigh the evidence to make such a finding.

Resulting Damage

Wells contends the trial court erred in determining the amount of out-of-pocket damages. "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. [Citations.] . . . [¶] For fraud arising out of the purchase, sale, or exchange of property, section 3343 provides that a plaintiff is entitled to his 'out-of-pocket' damages. The formula for determining 'out-of-pocket' losses under the statute is the difference between the actual value of what the defrauded person

parted with and the actual value of what he received in return." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252.)

There is an error in the trial court's calculation of damages, although the damages are otherwise supported by substantial evidence. The court awarded damages as follows:

"$1,400,000.00	Appraised/agreed value—the value of that which Dumas parted—Sec. 3343(a)
"- 329,553.00	Check (Exh. 23)—value of that which Dumas received—Sec. 3343(a)
"- 295,210.00	Net from resale of Nishida house (Exh. 146)—value of that which Dumas received—Sec. 3343(a)
"40,796.25	Cost of Resale of Nishida's house (Exh. 146) --Amounts actually and reasonably expended in reliance upon the fraud—Sec. 3343(a)(1)
"<u>39,550.00</u>	Cost of Repairs (Exh. 36)—Amounts actually and reasonably expended in reliance upon the fraud—Sec. 3343(a)(1)
"$1,185,603.25	Total damages for the real estate fraud
<u>"330,000.00</u>	$330,000 Business Loan with 10% interest

"$1,485,603.25 Total fraud damages for sale of property and business loan"

The error in the court's math is in its calculation of $1,185,603.25 as total damages for real estate fraud before factoring in the business loan. That total instead comes to $855,603.25. When the business loan of $330,000 is added, the total damages are $1,185,603.25. It therefore appears the trial court double-counted the $330,000 business loan—once in the real estate fraud damages, and a second time in the business loan damages. We order the total damages reduced to $1,185,603.25.

DISPOSITION

The judgment for compensatory damages is reduced to $1,185,603.25. As modified, the judgment is affirmed. Respondent Jose Dumas is awarded costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

KIM, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.