Filed 11/6/12 Chapete Properties v. Marcus & Millichap CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CHAPETE PROPERTIES, INC., Plaintiff and Appellant, v. MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICE, INC., ET AL., Defendants and Respondents.	B231440 (Los Angeles County Super. Ct. No. BC435353)

APPEAL from orders of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Reversed in part and affirmed in part.

Daniel F. Brookman; Michael J. Perry for Plaintiff and Appellant.

Scheper Kim & Harris, Diann H. Kim, Julio V. Vergara and Katherine Farkas for Defendants and Respondents.

Plaintiff and appellant Chapete Properties, Inc. (Chapete) appeals an order of dismissal in favor of defendants and respondents Donald Emas (Emas) and Earle Hyman (Hyman), following the sustaining of their demurrers to Chapete's second amended complaint without leave to amend. Chapete also appeals the trial court's order of dismissal in favor of defendants and respondents Marcus & Millichap Real Estate Investment Services, Inc. and its predecessor, Marcus & Millichap Real Estate Investment Brokerage Company (collectively M&M) following the sustaining of their demurrers to Chapete's third cause of action for intentional misrepresentation, fourth cause of action for intentional concealment and fifth cause of action for negligent misrepresentation without leave to amend.[1]

Chapete purchased commercial real property in Palm Desert (the Property) from Jeremy Levine and Denise Levine (not parties to this appeal). The Property was leased by EZ-Lube under a long term lease. M&M was the exclusive listing broker and procured the buyer in the transaction. Shortly after close of escrow, EZ-Lube defaulted on the lease and filed for bankruptcy. In this action, Chapete is suing M&M, as well as Emas and Hyman, real estate salespersons affiliated with M&M (collectively, defendants).

The essential issues presented are whether Chapete stated a cause of action against (1) M&M, Emas and Hyman for breach of fiduciary duty, intentional and negligent misrepresentation, and intentional concealment, and (2) against Emas and Hyman for negligence.

We conclude the demurrers should have been partially overruled because under the purchase and sale agreement (PSA), M&M assumed various duties, including the "duty to disclose all facts known to it materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the

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[1] In ruling on the demurrers to the second amended complaint, the trial court *overruled* M&M's demurrers to the first and second causes of action, which alleged causes of action for negligence. Chapete subsequently dismissed those remaining claims against M&M without prejudice in order to proceed with the appeal.

Buyer." Therefore, notwithstanding other provisions in the PSA which charged the Buyer with performing its own due diligence, M&M owed a duty of disclosure to the Buyer. Accordingly, the orders are reversed in part and affirmed in part.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The PSA.*[2]

On or about June 23, 2008, Alice Testa de Irueste (de Irueste) and/or her assignee, as buyer, entered into the PSA with the Levines, to purchase the real property at 74180 Highway 111 in Palm Desert for the sum of $2,915,000.

The PSA included the following provisions:

"22) AGENCY DISCLOSURE: [¶] 22.1) EXCLUSIVE LISTING: Marcus & Millichap Real Estate Investment Services is the exclusive listing broker of the property that is the subject of this transaction. Under California law, *Marcus & Millichap represents the Seller as the Seller's agent.* Marcus & Millichap also has procured the Buyer in this transaction. Marcus & Millichap is not the agent of the Buyer; however, Marcus & Millichap does have the following affirmative legal obligations to the Buyer: [¶] a. Diligent exercise of reasonable skill and care in the performance of its duties. [¶] b. A duty of honest and fair dealing and good faith. [¶] c. *A duty to disclose all facts known to it materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the Buyer*." (Italics added.) Thus, although the PSA specified that M&M was not the Buyer's agent, the PSA

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[2] The PSA was referenced in Chapete's pleadings but Chapete did not attach a copy of the PSA to its pleadings. The PSA is in the record on appeal by way of defendants' request for judicial notice in support of their demurrer to the original complaint. The trial court denied defendants' request for judicial notice The trial court's refusal to take judicial notice of the PSA was error. Because the PSA is essential to Chapete's claims against defendants, and because there is and can be no factual dispute regarding the contents of the PSA, the PSA is subject to judicial notice and may be treated as having been pled. (*Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 666, fn. 2 [judicial notice of settlement agreements in determining legal sufficiency of the complaint]; *Marina Tenants Assn. v. Deauville Marina Development Co*. (1986) 181 Cal.App.3d 122, 128 [judicial notice of lease agreement on demurrer].)

enumerated various legal obligations which M&M owed to the Buyer, *including a duty of disclosure*.

The PSA further provided:

"25. SCOPE OF AGENT'S AUTHORITY AND RESPONSIBILITY: . . . Agent shall not be responsible for performing any due diligence or other investigation of the Property on behalf of either Buyer or Seller, or for providing either party with professional advice with respect to any legal, tax, engineering, construction or hazardous materials issues. Except for maintaining the confidentiality of any information regarding Buyer or Seller's financial condition and any future negotiations regarding the terms of this Purchase Agreement or as otherwise required by law, *Buyer and Seller agree that their relationship with Agent is at arm's length and is neither confidential nor fiduciary in nature*." (Italics added.)

"26) BROKER DISCLAIMER: Buyer and Seller acknowledge that, except as otherwise expressly stated herein, Agent has not made any investigation, determination, warranty or representation with respect to any of the following: (a) the financial condition or business prospects of any tenant, or such tenant's intent to continue or renew its tenancy in the Property; . . . (e) the accuracy or completeness of income and expense information and projections . . . . [¶] Buyer agrees that investigation and analysis of the foregoing matters is Buyer's sole responsibility and that Buyer shall not hold Agent responsible therefore. Buyer further agrees to reaffirm its acknowledgement of this disclaimer at close of escrow and to confirm that it has relied upon no representations of Agent in connection with its acquisition of the Property."

With respect to the condition of the Property, paragraph 14 of the PSA stated: "It is understood and agreed that the Property is being sold 'as is', that Buyer has, or will have prior to the Closing Date, inspected the Property, and that neither Seller nor Agent makes any representation or warranty as to the physical condition or value of the Property or its suitability for Buyer's intended use. 'Property Condition' means each and every matter of concern or relevance to Buyer relating to the Property, including without

limitation the financial, legal, title, physical, geological and environmental condition . . . ; the fitness of the Property for Buyer's contemplated use."

Paragraph 36 of the PSA, an integration clause, states: "This Agreement, including addenda, if any, *expresses the entire agreement of the parties* and supersedes any and all previous agreements between the parties with regard to the Property. *There are no other understandings, oral or written,* which in any way alter or enlarge its terms, and there are no warranties or representations of any nature whatsoever, either express or implied, except as set forth herein. Any future modification of this Agreement will be effective only if it is in writing and signed by the party to be charged." (Italics added.)

Finally, the PSA concluded with the following advisement in upper case font: "THE PARTIES ARE ADVISED TO CONSULT THEIR RESPECTIVE ATTORNEYS WITH REGARD TO THE LEGAL EFFECT AND VALIDITY OF THIS PURCHASE AGREEMENT."

2. *Proceedings.*

a. *Original complaint.*

On April 9, 2010, de Irueste and Chapete filed the original complaint in this action, alleging 14 causes of action, including breach of fiduciary, fraud, negligence and financial elder abuse. The complaint named numerous defendants, including M&M, Emas, Hyman, as well as others not party to this appeal, including the Levines, the sellers, and John Scott and Scott Tax Associates, Inc. (Scott), accountants who allegedly advised de Irueste in the transaction.

b. *First amended complaint; cause of action for breach of fiduciary duty eliminated on demurrer.*

Chapete was the sole plaintiff to the first amended complaint. M&M, Emas and Hyman demurred to that pleading. The trial court sustained their demurrer to Chapete's cause of action for breach of fiduciary duty without leave, and their demurrers to Chapete's other causes of action with leave to amend.

c. *Second amended complaint; factual allegations*.

Chapete was the sole plaintiff on the operative second amended complaint, which alleged in relevant part: De Irueste, age 87, is the sole shareholder of Chapete, her corporation which purchased the Property. De Irueste told Hyman, a real estate broker with M&M, that because of her age she wanted to purchase a commercial property that was less of a hassle and required less hands-on management than her Los Angeles apartment building. Hyman persuaded her to enter into a 1031 exchange to sell the apartment building and then to purchase another commercial property to defer the tax liability. Hyman presented her with just one investment option, the subject Property in Palm Desert.

In June 2008, Hyman orally represented to de Irueste and her representative, Bonny de Irueste Olson (Olson), the following about the Property: "(a) The Property would increase in value about 8-10% per year; (b) Defendants typically sold properties containing franchise business for buyers who did not want to operate their own property and that the Defendants Hyman, Emas, M&M Real Estate, and M&M Investment had expertise in these types of transactions; (c) The tenant at the Property will pay all expenses and that there were no landlord responsibilities; (d) The Property would generate a capitalization rate or return of investment of about between 8%-10% per year, which made Plaintiff's purchase a sound investment; (e) The value of the Property was about $3,000,000; (f) That the Defendants Hyman, Emas, M&M Real Estate, and M&M Investment were looking solely after Plaintiff's interests in this transaction; (g) The tenant at the Property, the EZ Lube franchise was a viable and profit making business and a secure and stable commercial tenant for Plaintiff who was committed to lease the Property through 2023; (h) The Property was a safe and secure investment for Plaintiff; and (i) Bare-boned financial documents identifying the EZ Lube business at the Property that purported to show EZ Lube's operating income, expenses and other information for that Property, showed that EZ Lube was a viable financial entity, Plaintiff was making a safe and secure investment . . . ." The complaint referred to the foregoing items (a) through (i) of said Paragraph as the "First False Representations."

In reliance on the First False Representations, in late June 2008, de Irueste made an offer to buy the Property with the right to assign the purchase to Chapete. In or about late June 2008, Defendants Emas, Hyman, M&M Investment, and M&M Real Estate "confirmed that they would act as Plaintiff's real estate brokers and agents in connection with Plaintiff's purchase of the Property" and they agreed that they had, among others, the following duties to Plaintiff: (1) diligent exercise of reasonable skill and care in the performance of their duties; (2) a duty of honest and fair dealing and good faith; and (3) a duty to disclose all facts known to them materially affecting the value or desirability of the Property that are not known to or within the diligent attention and observation of the Buyer.

During the exchange of various counter-offers between June 23, 2008 and June 24, 2008, Hyman and M&M encouraged de Irueste to proceed with the transaction, "by representing that *the Property was a safe and secure investment for the Plaintiff* (hereinafter the 'Second False Representations')." (Italics added.)

The "Third False Representation" occurred during August through October 2008, when Hyman represented to de Irueste and Olson that they would be provided with the complete financial data of the EZ Lube tenant showing it was financially stable and that the Property was a "safe and secure investment for Plaintiff."

Chapete "had no expertise in this area, so it relied on Defendants Hyman, Emas [and M&M] for advice as to whether the documents showed that the EZ Lube business was a secure tenant for Plaintiff and that the EZ Lube was a viable tenant for the Property." In late September or early October 2008, Hyman advised de Irueste and Olson that EZ Lube's financial documentation "sufficiently demonstrated that the EZ Lube business on the Property was viable and that the EZ Lube tenant had the financial resources to fully comply with its obligations under the long term lease in effect at the Property (these false representations made by Defendant Hyman are hereinafter referred to as the 'Fourth False Representations')."

On October 21, 2008, escrow on the Property closed and Chapete became the owner of the Property.

Shortly thereafter, EZ Lube filed for bankruptcy and abandoned the Property. EZ Lube never paid Plaintiff any rent. "Thereafter, Plaintiff, who subsequently attempted to sell or re-lease the property, learned that it had been defrauded into purchasing the Property at an artificially inflated price -- the investment property was worth less than 70% than what was represented by [M&M]. Plaintiff was also deprived of about 15 years of income stream of present and future lease payments that it was relying on to sustain Alice de Irueste's retirement dreams."

Based on the above, the second amended complaint set forth causes of action for (1) negligence against Hyman and M&M (first cause of action); (2) negligence against Emas and M&M (second cause of action); (3) intentional misrepresentation against M&M and Hyman (third cause of action); (4) intentional concealment against M&M and Hyman (fourth cause of action); and (5) negligent misrepresentation against M&M and Hyman (fifth cause of action).

d. *Demurrer to second amended complaint*.

Defendants demurred to the second amended complaint in its entirety, asserting Chapete failed to state facts sufficient to state cause of action. Defendants further pled the complaint was uncertain on the following grounds: the complaint failed to specify the duties allegedly breached by each defendant and failed to specify the conduct by each defendant which gave rise to Chapete's claims; further, Chapete relied on undifferentiated allegations against multiple defendants, failed to identify wherein and to what extent the representations were false or misleading, and failed to identify the true facts that were allegedly concealed.

e. *Trial court's ruling on demurrer to second amended complaint.*

On December 8, 2010, the trial court sustained the demurrer without leave to amend as to all defendants on Chapete's causes of action for intentional misrepresentation, negligent misrepresentation and intentional concealment. With regard to the negligence claims, the trial court sustained the demurrer without leave to amend as to Emas and Hyman and overruled M&M's demurrer. (As noted, *ante*, Chapete later

dismissed its negligence claims against M&M without prejudice in order to proceed with this appeal.)

In sustaining the demurrers of Hyman and Emas to the negligence causes of action, the trial court found Chapete had failed to allege those individuals owed a duty. With respect to the causes of action against the various defendants for negligent and intentional misrepresentation and intentional concealment, the trial court found the allegations failed to allege facts with sufficient specificity.

f. *Attorney fees*.

On February 1, 2011, Emas and Hyman filed a motion seeking $60,810 in attorney fees as the prevailing parties in the action, pursuant to the attorney fee provision in the PSA.

The trial court granted the motion and awarded Emas and Hyman the sum requested, ruling that they were prevailing parties within the meaning of the attorney fee provision in the PSA.

This appeal followed.

CONTENTIONS

Chapete contends: the trial court's determination that there was no fiduciary duty between plaintiff and her real estate brokers and agents ignored longstanding black letter case law and should be reversed; the trial court erred in ruling that Chapete failed to state claims for negligence against real estate agents Emas and Hyman; the trial court further erred in its determinations that Chapete failed to state claims for intentional and negligent misrepresentation and fraudulent concealment; and the award of attorney fees should be reversed.

DISCUSSION

1. *Standard of appellate review*

a. De novo review of legal sufficiency of complaint.

"We apply well-established rules of review. 'A demurrer tests the legal sufficiency of the complaint. [Citation.] Therefore, we review the complaint de novo to determine whether it contains sufficient facts to state a cause of action. [Citation.]

"We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." [Citation.] The trial court exercises its discretion in declining to grant leave to amend. [Citation.] If it is reasonably possible the pleading can be cured by amendment, the trial court abuses its discretion by not granting leave to amend. [Citation.] The plaintiff has the burden of proving the possibility of cure by amendment.' [Citations.]" (*Marsh v. Anesthesia Service Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 491.)

b. *The PSA is subject to judicial notice and is treated as having been pled.*

Chapete repeatedly referred to the PSA in its pleadings, alleging, inter alia, that it entered into a purchase agreement for the Property in June 2008. However, Chapete did not attach a copy of the PSA to its pleadings.

Nonetheless, the PSA appears in the clerk's transcript because it was proffered by defendants, by way of their request for judicial notice in support of their demurrer to the original complaint. The trial court denied the request for judicial notice as improper.

The trial court's refusal to take judicial notice of the PSA was erroneous. Because the PSA is essential to Chapete's claims against defendants, and because there is and can be no factual dispute regarding the contents of the PSA, the PSA is subject to judicial notice and may be treated as having been pled. (*Performance Plastering v. Richmond American Homes of California, Inc., supra,* 153 Cal.App.4th at p. 666, fn. 2 [judicial notice of settlement agreements in determining legal sufficiency of the complaint]; *Marina Tenants Assn. v. Deauville Marina Development Co., supra,* 181 Cal.App.3d at p. 128 [judicial notice of lease agreement on demurrer].)

However, insofar as the PSA is ambiguous, Chapete is entitled to allege "its own construction of the agreement. So long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, in passing upon the sufficiency of the complaint, we must accept as correct plaintiff's allegations as to the meaning of the agreement. [Citation.]" (*Marina Tenants Assn. v. Deauville Marina Development Co., supra,* 181 Cal.App.3d at p. 128.)

2. *No cause of action stated for breach of fiduciary duty*.

"In making its determination of duty in the real estate transactions context, a court will take the following factors into account: 'Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency. [Citation.]' [Citation.]" (*Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1279.) If a "statutory duty is not alleged, then a plaintiff may seek to derive the defendant's duty from the general law of agency, i.e., from the agreement between the principal and agent." (*Ibid*.)

Here, Chapete has not alleged a statutory duty.[3] Therefore, we look to the PSA, which is the operative agreement between the parties, to determine the nature of defendants' duty to Chapete as the buyer of the Property.

The PSA expressly stated at paragraph 22: "Marcus & Millichap represents the Seller as the Seller's agent. Marcus & Millichap also has procured the Buyer in this transaction. Marcus & Millichap is not the agent of the Buyer . . . .

The PSA further provided at paragraph 25 that "Buyer and Seller agree that their relationship with Agent is at arm's length and is neither confidential nor fiduciary in nature."

Thus, the PSA specified that M&M was not the Buyer's agent and the PSA expressly eschewed a fiduciary relationship. Accordingly, Chapete is incapable of alleging the existence of a fiduciary relationship between the Buyer and the defendant brokers. Therefore, Chapete cannot state a cause of action against defendants for breach of fiduciary duty.

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[3] The inspection and disclosure requirements which Civil Code section 2079 imposes on real estate brokers and salespersons apply to residential real property of one to four dwelling units (Civ. Code, § 2079, subd. (a)), not to commercial real property.

3. *Viability of third and fifth causes of action against M&M and Hyman for intentional and negligent misrepresentation.*

As detailed above, Chapete's third and fifth causes of action for intentional and negligent misrepresentation alleged that M&M and its agent, Hyman, made various representations concerning the desirability of this investment property, the financial strength of EZ Lube, the long term lessee, and that defendants assured the purchaser the Property would be a "safe and secure investment." Chapete further alleged that it justifiably relied on defendants' representations because defendants had "superior knowledge: and were fiduciaries.[4]

We are mindful that the PSA stated, at paragraph 14, "that neither Seller nor Agent makes any representation or warranty as to the physical condition or value of the Property or its suitability for Buyer's intended use. 'Property Condition' means each and every matter of concern or relevance to Buyer relating to the Property, including . . . the financial . . . condition and . . . the fitness of the Property for Buyer's contemplated use." Further, paragraph 26 of the PSA provided: "Buyer and Seller acknowledge that, except as otherwise expressly stated herein, Agent has not made any investigation, determination, warranty or representation with respect to any of the following: (a) the financial condition or business prospects of any tenant, or such tenant's intent to continue or renew its tenancy in the Property; . . . (e) the accuracy or completeness of income and expense information and projections . . . ." Further, paragraph 36 of the PSA, the integration clause, stated: "This Agreement, including addenda, if any, expresses the entire agreement of the parties and supersedes any and all previous agreements between the parties with regard to the Property. There are no other understandings, oral or written, which in any way alter or enlarge its terms, and there are no warranties or representations of any nature whatsoever, either express or implied, except as set forth herein."

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[4] As discussed above, defendants were not Chapete's fiduciaries as a matter of law.

However, said provisions of the PSA cannot be viewed in isolation. Under paragraph 22 thereof, the broker defendants were charged with the "*duty to disclose all facts known to it materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the Buyer*." (Italics added.)

Chapete alleged that shortly after escrow closed on October 21, 2008, EZ Lube filed for bankruptcy, abandoned the property and never paid any rent to Chapete. Chapete also pled the defendants knew that the EZ Lube tenant at the property was not financially viable and would not be able to perform the terms and conditions of its tenancy, that many EZ Lubes or similar franchises in other locations were already defaulting on their lease payments, and that M&M already had been sued in connection with those transactions.

The alleged failure by M&M and its agent, Hyman, to disclose these material facts, known to them but not within the diligent attention and observation of the Buyer, is sufficient to state causes of action against them for intentional and negligent misrepresentation.[5]

Contrary to the dissent's argument, Chapete's allegations do not violate the parol evidence rule. Extrinsic evidence is admissible under an exception to the parol evidence rule to show that a contract was induced by fraud. (Code Civ. Proc., § 1856, subd. (g); *Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 389.)

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[5] "A [real estate] salesperson who utters an intentional or negligent misrepresentation, or fails to disclose a fact when there is a duty to disclose, is also *personally liable* to the third person for his or her own tortious conduct. [Fn. 17.]" (Miller & Starr, 2 Cal. Real Est. § 3:36 (3d ed.).) Accordingly, Hyman, as well as M&M, is potentially liable for these torts.

The dissent correctly notes that parol evidence of fraud cannot be used to show "a promise directly at variance with the promise of the writing." (*Bank of America Nat. Trust & Savings Ass'n v. Pendergrass* (1935) 4 Cal.2d 258, 263.) Chapete, however, is not alleging defendants made such a promise. Rather, Chapete contends defendants' alleged misrepresentations and nondisclosures violated specific provisions of the PSA, namely the duties set forth in paragraph 22.

4. *Viability of fourth cause of action against M&M and Hyman for intentional concealment*.

"In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) *the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff*; (3) the defendant actively conceals discovery from the plaintiff." (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294, fns. omitted, italics added; accord *Linear Technology Corp. v. Applied Materials, Inc*. (2007) 152 Cal.App.4th 115, 132.)

Here, Chapete pled facts sufficient to constitute a cause of action against M&M and Hyman for concealment. To reiterate, Chapete alleged that shortly after escrow closed on October 21, 2008, EZ Lube filed for bankruptcy, abandoned the property and never paid any rent to Chapete. Chapete also pled the defendants knew that the EZ Lube tenant at the property was not financially viable and would not be able to perform the terms and conditions of its tenancy, that many EZ Lubes or similar franchises in other locations were already defaulting on their lease payments, and that M&M already had been sued in connection with those transactions.

In sum, Chapete adequately pled that M&M and Hyman concealed specific material facts to induce Chapete to purchase the Property.

5. *The negligence claims against the individual defendants*.

a. *Hyman.*

The trial court sustained Hyman's demurrer to Chapete's cause of action for negligence without leave to amend. We conclude said cause of action was well pled and shall be reinstated.

In the second amended complaint, Chapete pled: Hyman convinced Chapete to enter into a 1031 exchange to sell its Los Angeles apartment property and then to purchase another commercial property to defer Chapete's tax liabilities; further, Hyman, together with M&M, was Chapete's listing broker and agent in connection with the sale of Chapete's apartment building.

Therefore, notwithstanding the fact that the PSA stated M&M exclusively represented the sellers of the Palm Desert property, namely, the Levines, Hyman owed Chapete a duty of care based on his representation of Chapete in the sale of the Los Angeles apartment building, which was the first phase of the 1031 exchange. Hyman also owed Chapete a duty of care pursuant to section 22 of the PSA, wherein the broker undertook the "[d]iligent exercise of reasonable skill and care in the performance of its duties." Thus, the complaint adequately alleged the existence of a duty on the part of Hyman.

Further, Chapete alleged Hyman breached his duties of skill, fidelity, good faith and care in the performance of his duties, such as by failing to protect Chapete's interest in connection with its purchase of the property, failing to advise Chapete about the propriety of its purchase, failing to ascertain and failing to disclose material facts about the financial viability of the EZ Lube lessee of the premises.

Given these allegations, Chapete's cause of action against Hyman for negligence was well pled.

b. *Emas.*

To reiterate, although paragraph 22 of the PSA recited that M&M exclusively represented the sellers, it also provided the selling broker had a duty of "[d]iligent exercise of reasonable skill and care in the performance of its duties." Therefore, under

the PSA, the selling broker undertook a duty of care to Chapete. This disposes of respondents' argument that Chapete failed to allege the existence of a duty owed by Emas.

Chapete further pled that Emas was negligent in the performance of his duties, such as by failing to disclose material facts to Chapete about the financial viability of the EZ Lube lessee. The pleading is sufficient to state a cause of action against Emas in negligence.[6]

6. *The attorney fee award*.

Chapete contends the trial court erred in awarding attorney fees to Hyman and Emas because they were not signatories to the PSA – the signatories were the Buyer, the Seller, and M&M, as the Agent. Chapete also asserts the fee award of $60,810 was excessive.

Because we reinstate Chapete's claims against Hyman (first, third, fourth and fifth causes of action) and against Emas (second cause of action), at this juncture there is no prevailing party. The order awarding attorney fees to Hyman and Emas is reversed. Any award of attorney fees will have to await the resolution of the merits of this matter.

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[6] We note that Chapete's causes of action against Emas for intentional and negligent misrepresentation and fraudulent concealment were eliminated on the demurrer to the first amended complaint, at which time the trial court sustained Emas's demurrers to said causes of action without leave to amend. Chapete does not challenge those rulings on appeal.

DISPOSITION

The order dismissing the second amended complaint is reversed with directions to reinstate Chapete's first cause of action against Hyman, second cause of action against Emas, and the third, fourth and fifth causes of action against Hyman and M&M; in all other respects, the order is affirmed. The order awarding attorney fees to Hyman and Emas is reversed. The parties shall bear their respective costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

I concur:

ALDRICH, J.-

KLEIN, P. J., Concurring and Dissenting.

I would affirm the orders of the trial court in their entirety. I concur with the majority opinion insofar as it upholds the trial court's sustaining of the demurrer to the cause of action for breach of fiduciary duty without leave to amend. I respectfully dissent from the majority opinion with respect to its resolution of the other causes of action in issue on appeal.

1. *No cause of action stated against M&M and Hyman for intentional or negligent misrepresentation.*

a. *PSA bars any oral representations or understandings.*

Chapete's causes of action for intentional and negligent misrepresentation alleged that defendants made various representations concerning the desirability of this investment property, the financial strength of EZ Lube, the long term lessee, and that defendants assured the purchaser the Property would be a "safe and secure investment." Chapete further alleged that it justifiably relied on defendants' representations because defendants had superior knowledge and were fiduciaries.[1] Chapete's claims are at odds with the express language of the purchase and sale agreement (PSA).

Specifically, with respect to the condition of the property, the PSA states in pertinent part at paragraph 14: "*neither Seller nor Agent makes any representation or warranty as to the physical condition or value of the Property or its suitability for Buyer's intended use*. '*Property Condition' means each and every matter of concern or relevance to Buyer relating to the Property,* including without limitation the *financial,* legal, title, physical, geological and environmental condition . . . ; the *fitness of the Property for Buyer's contemplated use*." (Italics added.)

Further, paragraph 26 of the PSA provided: "BROKER DISCLAIMER: Buyer and Seller acknowledge that, except as otherwise stated herein, *Agent has not made any investigation, determination, warranty or representation with respect to any of the following: (a) the financial condition or business prospects of any tenant, or such*

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[1] As discussed in the majority opinion, defendants were *not* Chapete's fiduciaries as a matter of law.

tenant's intent to continue or renew its tenancy in the Property; . . . (e) the accuracy or completeness of income and expense information and projections . . . ." (Italics added.)

Further, paragraph 36 of the PSA, the integration clause, states: "This Agreement, including addenda, if any, *expresses the entire agreement of the parties* and supersedes any and all previous agreements between the parties with regard to the Property. *There are no other understandings, oral or written,* which in any way alter or enlarge its terms, and there are no warranties or representations of any nature whatsoever, either express or implied, except as set forth herein." (Italics added.) Thus, in executing the PSA, the Buyer expressly disclaimed the existence of any oral representations or understandings concerning the Property.

Despite the integration clause, Chapete argues the express language of the PSA is not controlling because parol evidence is admissible to show fraud in the inducement, or to establish fraud or illegality. Chapete contends M&M's oral statements are admissible under the fraud exception to the parol evidence rule. (Code Civ. Proc., § 1856, subd. (g).)[2] Thus, the scope of the fraud exception to the parol evidence rule is the crux of this appeal. Chapete, and the majority, have misconstrued the parol evidence rule.

In *Bank of America Nat. etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, 263 the California Supreme Court explained the scope of the fraud exception to the parol evidence rule as follows: "Our conception of the rule which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument, or some breach of confidence concerning its use, *and not a promise directly at variance with the promise of the writing*." (Italics added.) *Pendergrass* is still good law.

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[2] Code of Civil Procedure section 1856, which codifies the parol evidence rule, states in pertinent part at subdivision (g): "This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, *or to establish illegality or fraud.*" (Italics added.)

(*Duncan v. The McCaffrey Group, Inc*. (2011) 200 Cal.App.4th 346, 369; *Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 379.)[3]

Thus, "the tort of promissory fraud based on an oral promise is limited by the parol evidence rule *when the oral promise directly contradicts the terms of the contract* to which the parties agreed." (*Duncan, supra,* 200 Cal.App.4th at p. 369.)

For example, in *Duncan,* the plaintiff contended that "defendants promised them that the Development would contain only custom homes, even though the Agreement specifically reserved to defendants the right to build other types of houses, including tract homes. In other words, plaintiffs allege that defendants promised they would not utilize a right included in the contract." *(Duncan, supra,* 200 Cal.App.4th at p. 377.) The parol evidence rule precluded plaintiffs from introducing evidence of that alleged promise. (*Ibid*.)

The *Duncan* court relied, inter alia, on this court's decision in *Banco Do Brasil, S.A. v. Latian, Inc*. (1991) 234 Cal.App.3d 973. In *Banco Do Brasil*, when required payments were not made, the bank sued Latian to enforce a written loan guaranty; Latian filed a cross-complaint alleging the bank had orally promised to extend a new $2 million line of credit, but failed to do so.

This court concluded that because Latian took the position that the extension of the line of credit was an essential part of the guaranty agreement, but the written contract stated the obligation to repay the debt was *unconditional*, the alleged oral agreement directly contradicted the written agreement and was inadmissible under the parol evidence rule. (*Banco Do Brasil, supra,* 234 Cal.App.3d at pp. 1003-1005.)
This court further held that admission of the alleged oral agreement could not be justified

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[3] On April 20, 2011, the Supreme Court granted a petition for review in *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (No. S190581; No. F058434.) According to the Supreme Court's statement of issues, "This case presents the following issue: Does the fraud exception to the parol evidence rule permit evidence of a contemporaneous factual misrepresentation as to the terms contained in a written agreement at the time of execution, or is such evidence inadmissible under *Bank of America National Trust & Savings Association v. Pendergrass* (1935) 4 Cal.2d 258, 263, as 'a promise directly at variance with the promise of the writing'?"

by allegations of promissory fraud. (*Banco Do Brasil, supra,* 234 Cal.App.3d at pp. 1009-1010) As "we have concluded that the claimed oral 'promise' of a $2 million line of credit is inconsistent with the written Guaranty Agreement, and is certainly not independent of it, [Latian's] claim of fraud with respect to this promise must also fail." (*Id*. at pp. 1010-1011.)

In the instant case, Chapete has asserted the existence of a fiduciary relationship, as well as oral promises and representations, all of which fly in the face of the express terms of the PSA. Those claims are barred by the PSA

Accordingly, Chapete is incapable of alleging it was induced by defendants' intentional or negligent misrepresentations to buy the Property.

b. *PSA precludes Chapete from alleging justifiable reliance*.

Further, even assuming the existence of any oral representations by defendant brokers, Chapete is incapable of alleging *justifiable reliance* thereon.

The PSA, at paragraph 25, stated: "SCOPE OF AGENT'S AUTHORITY AND RESPONSIBILITY: . . . . *Agent shall not be responsible for performing any due diligence or other investigation of the Property on behalf of either Buyer or Seller, or for providing either party with professional advice with respect to any legal, tax,* engineering, construction or hazardous materials issues." (Italics added.)

Further, paragraph 26 stated: "BROKER DISCLAIMER: . . . *Buyer agrees that investigation and analysis of the foregoing matters is Buyer's sole responsibility and that Buyer shall not hold Agent responsible therefore*. Buyer further agrees to reaffirm the acknowledgement of this disclaimer at close of escrow and to confirm that *it has relied upon no representations of Agent* in connection with its acquisition of the Property." (Italics added.)

Thus, the PSA assigned sole responsibility to the Buyer for performing due diligence or investigation of the Property. Therefore, Chapete cannot allege it relied on defendant brokers based on their purported "superior knowledge."

For these reasons, Chapete is incapable of stating a cause of action against defendants for intentional or negligent misrepresentation.

2. *No cause of action stated against Hyman and M&M for intentional concealment*.

a. *General principles*.

"In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) *the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff*; (3) the defendant actively conceals discovery from the plaintiff." (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294, italics added; accord *Linear Technology Corp. v. Applied Materials, Inc*. (2007) 152 Cal.App.4th 115, 132.)

Concealment "is a species of fraud, and '[f]raud must be pleaded with specificity.' [Citation.] To plead tort liability based on false or incomplete statements, the pleader must set forth at least the substance of those statements." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 878, italics omitted.)

b. *Chapete failed to plead facts sufficient to constitute a cause of action for intentional concealment.*

A review of the pleading discloses Chapete failed to allege any existing facts during the escrow period which would have established EZ Lube's financial distress and that EZ Lube would default on its lease on this particular Property, *or how defendant brokers would have been aware of the impending corporate bankruptcy of EZ Lube,* even if such facts did exist. Chapete failed to specify any material fact that existed during the escrow period and that defendants concealed from the Buyer.

Rather, Chapete merely alleged in general terms that defendant brokers concealed information on a range of topics, including: the present income and future anticipated income generated by the Property; the financial strength and business experience of the lessee; the true capitalization rate of the Property; the true actual value of the Property; and the true actual value of the lease.

Moreover, these matters, such as the fair market value of the Property and the financial condition of the lessee, were either known to, or ascertainable by the Buyer through its independent investigation. Further, the PSA assigned to the Buyer the sole responsibility for conducting its due diligence and investigation of the Property.

Chapete also alleged defendants concealed the fact that *absent a personal guarantee* on the EZ Lube lease, Chapete would be without recourse if the lessee defaulted. This concealment allegation is untenable. Chapete did not allege that defendants concealed the absence of a personal guarantee -- Chapete's contention in this regard is simply that defendants did not advise Chapete with respect to the *legal effect* of the lack of a personal guarantee on the lease.

This argument is meritless. The absence of a personal guarantee on the EZ Lube lease would have been readily ascertainable by a review of EZ Lube's lease. The PSA advised the Buyer and Seller to obtain legal advice regarding the transaction. Defendants' failure to advise the Buyer with respect to the significance of the fact that the lease was not backed by a personal guarantee does not amount to concealment of a material fact.

Chapete also alleged concealment of the fact that this was not a "safe and secure" investment for the Buyer and that other EZ Lubes or similar franchises had defaulted on their leases. These allegations do not amount to concealment of any material facts exclusively within the knowledge of defendant brokers. Further, pursuant to the PSA, the Buyer undertook sole responsibility for performing due diligence and investigation, including the "financial condition" and "business prospects" of the lessee, and the "suitability" and "fitness" of the Property for Buyer's purposes.

In sum, Chapete failed to allege defendants concealed specific material facts to induce the Buyer to purchase the Property.

c. *Alleged failure of M&M to disclose to Chapete the pendency of related litigation.*

Chapete's supplemental letter brief attached copies of filings in *Eclectic Properties East, LLC v. Marcus & Millichap,* a lawsuit in federal court in San Jose. *In Eclectic,* various plaintiffs sued 31 defendants relating to 22 commercial transactions. Fourteen of the properties involved Jiffy Lube franchises and 8 of the properties involved Church's Chicken franchises. To quote, "None of the properties are located in California."

However, Chapete asserts the instant case was part of M&M's fraudulent scheme. In the complaint, Chapete alleged M&M concealed from Chapete that "many *EZ Lubes or similar franchises* in other locations that the M&M Defendants and their related entities were the brokers and/or agents for in similar sales transactions were already defaulting on their rents and that litigation had commenced against some of the M&M Defendants . . . ."

As noted, the federal lawsuit against M&M involved Jiffy Lube franchises, while this case involves an EZ Lube franchise; also, all the properties involved in the federal suit are located out of state. In effect, Chapete is arguing that M&M should have disclosed in this transaction with Chapete that M&M had been sued for its role involving *other franchises* located in *other states*.

However, the allegation that M&M concealed the existence of said litigation from Chapete does not amount to concealment by M&M of a material fact exclusively within the knowledge of defendant brokers. Moreover, pursuant to the PSA, the Buyer undertook sole responsibility for performing due diligence and investigation, including the "financial condition" of the lessee, and the "suitability" and "fitness" of the Property for Buyer's purposes.

For these reasons, Chapete's reliance on the pendency of other litigation against M&M to show fraudulent concealment by M&M in this transaction is misplaced.

3. *No cause of action stated against Hyman and Emas for negligence*.

The remaining causes of action are Chapete's claims against Hyman and Emas, M&M real estate salespersons, sounding in negligence.

With respect to Hyman and Emas, Chapete allege negligence based on their failure to disclose the matters discussed above, i.e., the present and future anticipated income generated by the property, the financial strength of the lessee, the true capitalization rate of the Property, the actual value of the Property, the actual value of the lease, the failure of other EZ Lubes and other franchises, and that the Property was not a safe and secure investment for plaintiff.

To reiterate, the PSA expressly stated that M&M was solely representing the Seller and that it did not represent the Buyer in this transaction. Further, under the PSA, the Buyer undertook "sole responsibility" for performing its financial due diligence. Therefore, Chapete is incapable of stating a cause of action against the individual defendants for not duly advising the Buyer with respect to the soundness of the purchase.

4. *Elder abuse*.

In an attempt to inject the issue of financial elder abuse, Chapete asks this court to "keep in mind" that "Appellant is in fact an 80+ year old unsophisticated widow" who relied on M&M for guidance.

The record reflects that Alice de Irueste is the sole shareholder of Chapete. However, de Irueste is not a party to this proceeding. The purchaser of the subject real property was not de Irueste, but rather, Chapete, a corporation. Further, Chapete was the plaintiff below and is the sole appellant before us. De Irueste is not before this court.

5. *Attorney fee award to Emas and Hyman*.

a. *The contractual attorney fee clause extended to Hyman and Emas*.

Chapete contends the trial court erred in awarding attorney fees to Hyman and Emas because they were not signatories to the PSA – the signatories were the Buyer, the Seller, and M&M, as the Agent.

The PSA's attorney fee provision states: " "In any litigation . . . which may arise between any of the parties hereto, *including Agent,* the prevailing party shall be entitled to recover its costs, including . . . reasonable attorneys' fees in addition to any other relief to which such party may be entitled." (Italics added.)

Xuereb v. Marcus & Millichap, Inc. (1992) 3 Cal.App.4th 1338 (*Xuereb*), which involves a substantially similar attorney fee provision, is on point. There, plaintiffs sued Marcus & Millichap, Inc. and Thomas Coates, a licensed commercial real estate agent employed with Marcus & Millichap, alleging various causes of action arising out of a real estate transaction in which plaintiffs were the purchasers. Following a jury trial in which the jury returned a verdict in the brokers' favor, they filed a motion for attorney fees and costs pursuant to the attorney fee provision in the purchase agreement. The trial court denied the motion on the ground the case had been tried on tort theories rather than on the contract. (*Id*. at p. 1340.)

Xuereb reversed, concluding the trial court erred in denying defendants' motion for attorney fees. *Xuere*b held the language of the attorney fee provision "is broad enough to encompass both contract actions and actions in tort; *and, by its express terms, it covers disputes involving the 'Agent,' that is, appellants* [i.e., Marcus & Millichap as well as Coates]." (*Xuereb, supra*, 3 Cal.App.4th at p. 1343, italics added.) *Xuereb* reversed and remanded with directions to make an award of reasonable attorney fees to Coates as well as to the employing broker. (*Id*. at p. 1345.)

b. *No showing the award was excessive.*

Chapete also asserts the fee award of $60,810 was excessive.

This court's review is deferential. In reviewing an award of attorney fees, the amount awarded by the trial court will not be set aside absent an affirmative showing of abuse of discretion in that the award is manifestly excessive; all intendments and presumptions are indulged in favor of the correctness of the trial court's order. (*Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1274.)

The attorney fee motion was supported by counsel's declaration showing counsel had spent 310 hours defending this matter. One half of the time, or 155 hours, was allocated to the two individual defendants, Hyman and Emas. On this record, there was no abuse of discretion in the amount awarded.

In sum, I would affirm the orders of the trial court in their entirety.

KLEIN, P. J.