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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JIM MALJANIAN,

Plaintiff and Appellant,

v.

BIG BLACK DOG, LLC et al.,

Defendants and Respondents.

2d Civil Nos. B277922, B280864
(Super. Ct. No. 56-2015-00465559-
CU-OR-VTA)
(Ventura County)

In consolidated appeals, Jim Maljanian appeals a judgment entered in favor of defendants Big Black Dog, LLC (BBD), John Ochoa, and Realty Adventures, Inc. (Realty) following orders granting summary judgment and awarding attorney fees.¹ We affirm.

FACTUAL AND PROCEDURAL HISTORY

This appeal concerns a failed real estate transaction between Maljanian and BBD for the purchase and sale of

¹ We sometimes refer to Ochoa and Realty Adventures, Inc. collectively as “Realty,” except where clarity demands that we draw a distinction.

commercial property located in Ventura. On March 24, 2015, Maljanian filed an action alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, specific performance, breach of fiduciary duties, and tortious interference with prospective economic advantage. Maljanian alleges that seller BBD breached the written real estate agreement by cancelling escrow and that real estate agent Ochoa and Ochoa's employer breached their fiduciary duties to him. Defendants answered the complaint and following discovery, moved for summary judgment asserting that Maljanian did not satisfy all conditions precedent set forth in the agreement. (Civ. Code, §§ 1436, 1439.) Maljanian responded to the motion in propria persona. Evidence, including declarations, depositions, documents, and email communications, established this:

In 2014, BBD owned commercial real property located at 4285 Crooked Palm Road in Ventura, consisting of a 4,320-square-foot building situated upon 139,392 square feet of land. BBD sought to sell the property and Maljanian, represented by agent Ochoa and real estate broker Realty Adventures, Inc., offered to purchase the property. On December 17, 2014, the parties entered into a standard written purchase and sale agreement (Agreement). Terms included a \$600,000 sales price, a \$100,000 cash down payment, and \$500,000 seller-financing for 36 months at 5.5 percent interest. The Agreement also disclosed that another agent of Realty represented BBD.

The Agreement states that its effectiveness is expressly conditioned upon the waiver or satisfaction of certain contingencies referred to as "Buyer's Contingencies." Section 8.6 of the Agreement provides that the escrow officer "shall verify

that all of Buyer's contingencies have been satisfied or waived prior to Closing."

Section 9.1 of the Agreement states that the "[c]losing of this transaction is contingent upon the satisfaction or waiver of the following contingencies[.]" Section 9.1 adds: "IF BUYER FAILS TO NOTIFY ESCROW HOLDER, IN WRITING, OF THE DISAPPROVAL OF ANY OF SAID CONTINGENCIES WITHIN THE TIME SPECIFIED THEREIN, IT SHALL BE CONCLUSIVELY PRESUMED THAT THE BUYER HAS APPROVED SUCH ITEM, MATTER OR DOCUMENT."

(Capitalization in original.) Section 9.1(b) provides that the buyer has 30 days from receipt of the Property Information Sheet to satisfy himself regarding "the physical aspects and size of the Property." Section 9.2 states that the buyer's contingencies "are for the benefit of, and may be waived by, Buyer, and may be elsewhere herein referred to as 'Buyer's Contingencies.'" Section 23.3 states that "[t]ime is of the essence of this Agreement."

Section 9.1 also provides for the "conditional approval" of any contingency, which is to be deemed a "disapproval" pursuant to the Agreement, unless the seller agrees to satisfy the condition imposed by the buyer.

The parties executed written escrow instructions with Lawyers Title Company. Shirley Franks was the escrow officer designated for the transaction. On January 14, 2015, Franks received the Property Information Sheet from BBD and forwarded it to Maljanian.

Maljanian then inspected the real property and prepared a lengthy list of his perceived deficiencies, including assertions of deferred maintenance, necessary repairs, and zoning issues. On January 21, 2015, Maljanian emailed Ochoa and stated that he

was prepared “to finalize the purchase” but desired “a credit amount” for the property’s deficiencies for “a new price of \$500,000.”

On February 3, 2015, and again on February 4, 2015, Ochoa sent emails to Maljanian reminding him that the inspection contingency period would expire 30 days following his receipt of the Property Information Sheet. On February 11, 2015, Franks sent an email to Ochoa advising him that the contingency period would expire on February 13, 2015.

On February 11, 2015, Maljanian telephoned Franks and stated that he was not removing any of the Buyer’s contingencies and requested that Franks notify Ochoa. Franks then sent an email to Ochoa and a copy to Maljanian stating that Maljanian was not “removing any of Buyer’s contingencies at this point.” Maljanian spoke with Ochoa that day and confirmed that he was not removing any contingencies.

The following day, Maljanian sent an email to Franks thanking her for her note on “timelines and contingencies.” Maljanian also referred to his list of the property’s asserted deficiencies and stated that he requested an adjustment regarding the purchase price. He also informed Franks that he and BBD were discussing a lease/option arrangement or an all-cash transaction.²

On February 12, 2015, Ochoa requested an escrow amendment to extend the deadline for expiration of the buyer’s

² Maljanian offered a copy of this email in his opposition to the summary judgment motions. The trial court sustained evidentiary objections to Maljanian’s exhibits because he failed to authenticate them. Many of Maljanian’s exhibits are the same as offered by defendants, however. We consider this February 12, 2015, email here.

contingencies by two weeks to February 27, 2015. Maljanian signed the amendment and Ochoa sent it to BBD. Ochoa also informed an employee in BBD's office that Maljanian was not removing any contingencies. Ben Doud, the manager of BBD, agreed to the extension request.

Ten days later, Doud, on behalf of BBD, demanded that Maljanian either close the deal as set forth in the Agreement or exercise his right to terminate the Agreement: "This is to advise you, that going back to the original contract, the purchase price for the property is \$600,000, \$100,000 be paid at closing with \$500,000 being carried by the seller at five and half percent interest only for three years. Since this contract was entered into you raised several objections to the property as far as physical condition and zoning and we have mutually attempted to renegotiate a deal we could both live with but have not been able to do so. All that being said this is to advise you that I expect you to either close the property under our original agreement or use your right under the contract to terminate it because of the various issues you've illuminated in previous emails none of which I intend to address, fix or repair. [¶] Not all deals work [and] this appears to be one of those."

The buyer's contingency period expired on February 27, 2015, and Maljanian did not provide an express waiver of contingencies to BBD or to the escrow officer. On March 2, 2015, Doud, on behalf of BBD, cancelled escrow. Maljanian responded to the cancellation in an email to the escrow officer acknowledging that she had informed the parties and realtors that the buyer's contingencies were not being released. She cancelled the escrow and returned Maljanian's \$15,000 deposit.

Following written and oral argument, the trial court decided that Maljanian's claims were foreclosed as a matter of law because he refused to satisfy, waive, or release the buyer's contingencies set forth in the Agreement. The court then granted summary judgment to defendants.

BBD thereafter sought its \$142,418 attorney fees pursuant to section 16 of the Agreement and Civil Code section 1717.³ It supported its request with detailed fee statements and a breakdown of general tasks for which the attorney fees were incurred. Following a contested hearing, the trial court awarded BBD a reduced amount of \$94,945.34.

Realty also sought its attorney fees pursuant to the Agreement and statute. Realty supported its request with a breakdown of fees and costs incurred as well as copies of redacted billings containing time expended and hourly professional fees. Following the hearing, the trial court awarded Realty \$66,164.29 attorney fees.

Maljanian appeals and contends that the trial court erred by granting summary judgment in favor of BBD and Realty and thereafter awarding their attorney fees and costs, which he asserts are unreasonable.

DISCUSSION

I.

Maljanian argues that the evidence establishes that he did not disapprove the buyer's contingencies by a writing to the

³ Section 16 provides: "If any Party or Broker brings an action or proceeding . . . involving the Property whether founded in tort, contract or equity, or to declare rights hereunder, the Prevailing Party . . . in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees."

escrow officer as required by the Agreement. For that reason, he asserts that section 9.1(b) of the Agreement expressly provides a conclusive presumption that he approved the buyer's contingency relating to the "the physical aspects and size of the Property." Maljanian adds that a conclusive presumption may not be rebutted or contradicted. He points out that the Agreement permitted him to close escrow five days after the expiration or waiver of the buyer's contingencies.

Maljanian also asserts that his request for a price adjustment was "an informal request for a credit," not a conditional approval which, pursuant to section 9.1 of the Agreement, constitutes disapproval. Further, he claims the phrase "conditional approval" is ambiguous.

Summary judgment is appropriate only where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618.) A defendant seeking summary judgment must show that the plaintiff cannot establish at least one element of his cause of action. (*Ibid.*) On review of an order granting or denying summary judgment, we examine the evidence presented to the trial court and determine whether the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the court's decision de novo and liberally construe the evidence in favor of the party resisting the summary judgment motion. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142 [reviewing court independently examines record to determine whether triable issues of fact exist].) "We apply a de novo standard of review to an order granting summary judgment

when, on undisputed facts, the order is based on the interpretation . . . of the terms of [a contract]." (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390.)

Interpretation of a written instrument is solely a judicial function when it rests upon the words of the instrument alone or where there is no conflict in the evidence of the parties' mutual intent. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.) The mutual intention of the parties at the time of the contract formation governs contract interpretation. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 288.) Rules governing contract interpretation require the court to first look to the language of the contract to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it. (*Ibid.*) If the contract language is clear or explicit, the language governs. (*Powerine Oil Co., Inc. v. Superior Court, supra*, 37 Cal.4th 377, 390.)

Although the parties did not argue the issue of "conditional disapproval" in the trial court, the court's signed order recognizes that Maljanian conditionally disapproved the buyer's contingency when he sought to renegotiate the sales price. The order states: "[Maljanian] affirmatively notified all parties that the condition of the property was only acceptable if he received a credit reducing the purchase price \$100,000, and under the terms of paragraph 9.1 of the [Agreement], such a conditional approval is deemed a disapproval of the Buyer's Contingency as to the condition of the property." We consider this issue here because it raises a pure question of law on undisputed facts regarding the interpretation of a contract. Moreover, the parties have argued the point on appeal. (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417.)

Section 9.1 of the Agreement is plain that a conditional approval constitutes disapproval of the buyer's contingency. The phrase is clear that approval rests upon the satisfaction of a condition – here, Maljanian's request for a reduction in the purchase price. On February 12, 2015, Maljanian sent an email to Franks describing his "extensive list" of the property's deficiencies, his request for "a credit," the parties' recent discussion of a lease/option and a \$400,000 lease option price, and his willingness to close escrow "pending a verified agreement" regarding a lease option or BBD's acceptance of his all-cash offer rather than seller-financing. Maljanian closed the email by stating, "It is my understanding that both realtors, escrow, and [BBD] have all been copied on this update." There can be no doubt that Maljanian exercised his power of conditional disapproval which was communicated to BBD, Franks, and the realtors. Having terminated the contract, Maljanian had no power to create an obligation by BBD by a late implied waiver and conclusive presumption pursuant to section 9.1. A plaintiff cannot recover on a contract without alleging and proving performance or waiver of performance of conditions precedent. (Civ. Code, §§ 1436, 1439; *Sosin v. Richardson* (1962) 210 Cal.App.2d 258, 264.)

The trial court also properly granted summary judgment in favor of Realty because Maljanian failed to produce evidence that Realty breached any duty to him that proximately caused him harm. Maljanian used the escrow period and the extension thereto to continue to negotiate the terms of the transaction. His February 12, 2015, email to Franks stated that he was ready to perform but awaiting further agreement on a lease/option or cash price. Failure to close the transaction according to its initial

terms was due to Maljanian's conditional disapproval, not the breach of any duty owed to him by Realty.

II.

Maljanian challenges the attorney fee awards to BBD and Realty as “excessive” and supported only by “bare bone” evidence of fees incurred. He contends that the awards are an abuse of discretion.

The trial court has discretion to determine the amount of reasonable attorney fees. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096.) The value of legal services performed is a matter in which the trial court has its own expertise. (*Ibid.*) The court makes its determination after considering various factors, including the nature of the litigation, its difficulty, the amount of services involved, the skill required and the skill employed, and other circumstances. (*Ibid.* [approving number of hours expended multiplied by the prevailing market rate for comparable services in the community].) An experienced trial judge is the best judge of the value of professional services rendered in his court and that determination will not be reversed on appeal unless it is clearly wrong. (*Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 698.) Contractual attorney fee clauses have been interpreted to also include recovery of attorney fees and costs on appeal. (*Sixells, LLC v. Cannery Business Park* (2008) 170 Cal.App.4th 648, 656.)

The trial court properly awarded reasonable attorney fees to BBD and Realty. BBD supported its application for \$142,418 attorney fees with a declaration describing the experience and qualifications of the professional employees (two attorneys and one paralegal) who earned fees as well as a general breakdown of tasks for which the fees were incurred. BBD also provided eight

pages, single-spaced, of a "Detail Transaction File List," reflecting the time spent for each task and the fees charged BBD for each task. Although an award of \$142,418 would have been reasonable and supported by this evidence, the court awarded BBD a reduced amount of \$94,945.34. Realty also supported its application for fees with a summary of fees incurred and lengthy billing statements explaining the time spent on particular tasks and the professional fees charged for each task.

The appellate record reflects that Maljanian resisted discovery and forced BBD to obtain court orders compelling discovery. Maljanian also responded to the summary judgment motions in propria persona; his response was in part incomprehensible and contained inadmissible evidence. The trial court sustained most of BBD's evidentiary objections thereto. BBD also prepared and filed a motion to expunge the lis pendens that Maljanian placed against the property. The court impliedly considered these factors in calculating the fee awards.

The judgment is affirmed. Respondents shall recover costs and reasonable attorney fees on appeal.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Vincent J. O'Neill, Judge
Superior Court County of Ventura

Law Office of Gerald Philip Peters, Gerald P. Peters for
Plaintiff and Appellant.

Ferguson Case Orr Paterson, LLP, David W. Tredway,
Joshua S. Hopstone for Defendant and Respondent Big Black
Dog, LLC.

R2 Law Group, LLP, Robin M. McConnell for Defendants
and Respondents Realty Adventures, Inc., a California
Corporation, dba Lee & Associates La-North/Ventura County,
and John Ochoa.