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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

AFC-LOW INCOME HOUSING PARTNERS et al., Plaintiffs and Appellants, v. POZ VILLAGE DEVELOPMENT et al., Defendants and Respondents.	B244108 (Los Angeles County Super. Ct. No. BC354676)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ralph Dau, Judge. Affirmed.

Reuben Raucher & Blum, Timothy D. Reuben, Stephen L. Raucher and Ashley J. Brick for Plaintiffs and Appellants.

Kennedy Kamrowski and J. Grant Kenney for Defendants and Respondents.

The plaintiffs in this case include United Housing Preservation Corporation (United), AFC-Low Income Housing Partners (AFC-Low Income) and AFC-American Housing (AFC-American). The defendants are POZ Village Development Inc. (POZ) and The Bedford Group (Bedford). The parties were partners in the same partnership.

United sought to purchase the general partnership interests of defendants. Pursuant to an agreement, the purchase price was to be determined by an independent appraisal. When the appraisal was completed it included a debt of nearly two million dollars owed to POZ and Bradford. Plaintiffs sought to rescind the purchase of the partnership on the ground that United suffered from a mistaken belief that the appraised value of the two partnership interests to be purchased would not include the debt owed.

Following a court trial, judgment was entered in favor of defendants. The court concluded the evidence did not demonstrate United was mistaken about the interest to be acquired in the purchase. Plaintiff contends the trial court erred in its determination. We disagree and affirm the judgment.

FACTS

The Coliseo Housing Partnership (hereafter the Partnership) was formed in 1988 to construct and operate a low to moderate income housing project on Martin Luther King Boulevard near the Los Angeles Memorial Coliseum. The purpose of the Partnership was to qualify for and sell low-income housing tax credits. By October 1990, there were six partners in the partnership: United (a general partner with a .5% interest), co-plaintiffs AFC- Low Income and AFC American (limited partners with a combined 97% interest), defendants POZ and Bedford (general partners with a combined 1.5% interest), and Housing Preservation Partners (a limited partner with a 1% interest). (Exh. 77) The partnership was governed by the Amended and Restated Agreement of Limited Partnership of Coliseo Housing Partnership, effective May 1, 1990, (hereafter the Agreement). (Exh. 73)

The Partnership's financial statements for the years ended December 31, 1991, 1992, 1993, 1994, 1995 and 1996 show, in the notes under "liabilities other than current,"

notes due to the general partners in the amount of $1,743,000. (Exhs. 112, 113, 114, &115) The statements for 2004 and 2005 do not show these debts. They contained a note which states: "During 2004, it was discovered that the general partner notes totaling $1,743,000 were not valid notes and should never have been recorded on the books of the Partnership. . . ." (Exh. 117) The letter from the auditors transmitting these two financial statements to the Partnership is dated February 10, 2005.

On November 21, 2005, Charles Quarles, the president of Bedford, faxed a copy of a promissory note dated May 2, 1989 in the amount of $1,743,000 to United's attorney Max Perry. The note was drawn in favor of POZ from the Partnership. (Exh. 99) The parties refer to the note as the Developer's Note. Quarles sent the copy at Perry's request. Quarles later told Perry that Bedford had a one-half interest in the Developer's Note. Perry sent a letter to Quarles contending the Developer's Note had been superseded by the May, 1990 Agreement.[1] (Exh. 136)

United's president Deane Ross saw the Developer's Note after it arrived at United in November 2005. He understood there was a disputed claim concerning whether a debt existed as a result of the note.

On April 26, 2006, the limited partners of the Partnership notified POZ and Bedford that they had been removed as general partners.[2] On October 16, 2006, United gave notice of its intention to buy out POZ and Bedford's interest in the Partnership pursuant to section 9.02(f) of the Agreement. That section provides "In the event of the removal . . . of a General Partner . . . , the General Partner's General Partner Interest shall

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[1] Section 14.13 of the Agreement provides: "This Agreement constitutes the entire understanding and agreement among the parties hereto with respect to the subject matter hereof, and there are no agreements, understandings, restrictions, representations or warranties among the parties other than those set forth herein or herein provided for. Following is a description of other agreements entered into by and among the parties which are merged into and superseded by this Agreement: [¶] . . . [¶] 3. Promissory Notes to POZ and Bedford dated May 2, 1989 . . . ."

[2] United's president, Ross, was also the president of AFC Capital Corporation. That corporation is a general partner in AFC – Low Income one of the limited partners.

be converted into a Limited Partner Interest. . . unless the remaining . . . General Partner or the Partnership elects to buy out the General Partner's General Partner Interest at its fair market value determined" by the appraisal process set forth in Section 9.01(b). "General Partner Interest" is defined as "the interest of each General Partner in the Partnership pursuant to the terms of this Agreement." (Section 1.20)

Pursuant to Section 9.01(b) of the Agreement, POZ and Bedford together selected an appraiser, while United selected a second appraiser. There was a difference of approximately $13 million between the two appraisals. The Agreement provides: "If the two appraisers . . . shall be unable to agree on the fair market value of the [removed] General Partner's General Partner Interest . . . they shall appoint a third appraiser. The decision, in writing, of the third appraiser shall be binding and conclusive" on the removed and remaining general partners. Ultimately, the superior court appointed the third appraiser, William Hanlin.

Hanlin served his award on March 19, 2009, and a revised award on April 29, 2009. (Exh. 308) Hanlin awarded POZ $4,891,658 and Bedford $3,052,554, for a total amount of $7,944,212. Each award included $2,857,474 for "Debt Equity – Developer's note." This amount represented the original principal of $1,743,00 plus unpaid interest. The appraisal noted "that Section 9.02(f) of the partnership agreement does not define a General Partner's Interest as being limited to only the capital interest." The appraisal also found the "term "buy-out" is not defined in the partnership agreement. One definition of "buy out" is "*The purchase of the entire holdings or interests of an owner or investor.*"

On May 19, 2009, United and the other plaintiffs moved the court to vacate the appraisal award. On May 26, 2009, United sent a Conditional Notice of Rescission which gave notice that if the arbitrator's award was confirmed, "United rescinds any and all notices that United will buy out the partnership interests of POZ and Bedford" on the grounds of mutual and/or unilateral mistake. On June 12, 2009, the trial court confirmed the award. An interlocutory judgment was entered on August 3, 2009.

On January 11, 2010, United and the other plaintiffs filed their First Amended and Supplemental Complaint which included two causes of action for rescission. In its Fourth Cause of Action for Rescission – Mutual Mistake, United alleged that when it served notice of its intention to buyout POZ's and Bedford's Partnership interests, it did so "under a material, mutual mistake of fact in that – despite the parties' understanding and instructions to the Appraiser to the contrary – the Appraiser's Award included the Developer's Note in the valuation of [POZ and Bedford's] Interest, and the Appraiser included within his Award a purported obligation for the Developer's Note representing most of the value of the appraisal." United further alleged that it "was induced to enter the contract because of its mistaken belief that the Developer's Note would not be part of any appraisal." In the Fifth Cause of Action for Rescission – Unilateral Mistaken, United alleged that even if POZ and Bedford did not share United's mistaken belief, they "were aware or should have been aware of the mistake of United and unfairly used that mistake to take advantage of United in that they used the Developer's Note and inserted it into the appraisal process in order to gain a more favorable appraisal."

In February, 2011, the court held a bench trial on United's causes of action for rescission. United offered the testimony of Ross and industry expert Richard Devine. In addition, United offered numerous documents which were admitted into evidence. Bedford offered the testimony of Quarles and POZ the testimony of Rev. Hardwick, the chairman of POZ's Board.

The pertinent testimony can be easily summarized. Ross was asked if he thought that when he signed the notice of intent to buy out POZ and Bedford that United was electing to buy out POZ or Bedford's interest in a promissory note. Ross replied, "Absolutely not." When asked why he said that, Ross stated: "[T]his letter was 2006. The Amended Partnership Agreement itself said that all the notes were superseded that were to POZ or Bedford, so there were no notes effective at that time, as far as I knew." When asked what United believed was included in the scope of the buy-out, Ross stated: "the fair market value of the former general partners' interests."

The court found that United did not have a mistaken belief about a "fact past or present" or a belief "in the present existence of a thing material to the contract which does not exist." The court summarized United's belief as "a mistaken expectation concerning the outcome of an upcoming contested proceeding." The court found that United was not entitled to rescission.

On May 12, 2011, on its own motion, the court issued a minute order stating that it was reconsidering its June 12, 2009 order confirming the appraisal award and the resulting interlocutory judgment of August 3, 2009 based on "the evidence and briefs received in the Phase One trial" of the rescission claims. POZ and Bedford appealed. In an unpublished opinion filed on August 31, 2012, we reversed the trial court's October 2011 orders vacating the appraisal award and directed the court to reinstate its June 12, 2009 order confirming the appraisal order and the August 3, 2009 interlocutory judgment. (*AFC-Low Income Housing Credit Partners v. POZ Village Development, Inc.* (August 31, 2012, B237721).)

On September 21, 2012, following the entry of judgment on the Phase One and Phase Two trials, United filed its notice of appeal in this case.

DISCUSSION

In its statement of decision on the rescission causes of action, the trial court analyzed United's belief as follows: "United's position amounts to this: if it had known how the appraisal and post-appraisal motions would come out, it would not have given the notice of intent to buy out POZ's and Bedford's partnership interests. United's inability to predict the future outcome of that process, which it put in play by its notice, is not a past or present fact, or a belief in a present existence of a thing, about which United was mistaken when it gave notice of intent to buy out, and the situation here does not entitle United to rescind that notice."

United contends the trial court erred in characterizing its mistake as a mistaken belief as to the outcome of a future event, rather than a mistake of fact concerning the interest being acquired by the purchase.

A. Requirements for rescission based on mistake of fact

A party may rescind a contract "[i]f the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake . . . . (Civ. Code, § 1689, subd. (b)(1).) The "general rule is that where an agreement is founded upon a *mutual* mistake of fact which is material and goes to the essence of the contract, relief will be granted to the one against whom it is sought to be enforced." (*Estate of Barton* (1950) 96 Cal.App.2d 234, 239 [emphasis added].) When the mistake of fact is unilateral, rescission will be granted if the non-mistaken party knew or had reason to know of the mistaken party's error or if enforcement of the resulting contract would lead to an unconscionable result. (*Donovan v. RRL Corp*. (2001) 26 Cal.4th 261, 281.)

"The type of 'mistake' that will support rescission is defined in Civil Code section 1577 ('mistake of fact') and Civil Code section 1578 ('mistake of law')." (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1421.) Civil Code section 1577 applies only to a mistake of "objective existing fact." (*Ibid*.) [3]

B. The nature of United's mistake

The reason for the trial court's characterization of United's mistake as being a mistake concerning the outcome of a future event is clear. United's conditional notice of rescission states: "United . . . did not know that Mr. Hanlin would include the Developer's Note in his appraisal of POZ and Bedford's partnership interests, and indeed United . . . believed that Mr. Hanlin's appraisal of POZ and Bedford's partnership interests would <u>not</u> include the Developer's Note." (Exh. 121) The allegations of United's complaint refer to "its mistaken belief that the Developer's Note would not be

[3] Civil Code section 1577 provides in full: "Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: [¶] 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, [¶] 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed."

part of any appraisal." The outcome of a future event is not an "objective existing fact." A mistake about that outcome is not a basis for rescission.

Ross's testimony showed that United's belief about the outcome of the appraisal was based on its interpretation of the Agreement, but this underlying belief does not provide a basis for rescission either. Ross testified he understood the Agreement to bar inclusion of the Developer's Note in the buy-out valuation of a partner's interest. Thus, he did not expect the note to be included in the appraisal. As we explained in our earlier opinion, "[t]he appraiser's scope of authority is set by the agreement. Section 9.01(b) provides the process to be used when a general partner or successor general partner elected to buy out the withdrawing 'General Partner's General Partner Interest' at fair market value . . . . [¶] The language in the agreement does not specify what methodology should be used. It does not define present market value. The agreement which appears to be negotiated by business entities leaves it up to the appraisers to determine what methodology should be utilized. The appraiser, Hanlin, did not exceed his powers [when he included the Developer's Note in his valuation of POZ and Bedford's partnership interests]. No limitation was set in the agreement." Thus, Ross's belief about the preclusive effect of the Agreement was a subjective misinterpretation of the Agreement. (See *Hedging Concepts, Inc. v. First Alliance Mortgage Co., supra,* 41 Cal.App.4th at p. 1421 [party's incorrect belief that contract only required him to introduce clients in order to be entitled to commissions was a subjective misinterpretation of the contract, not a mistake of an objective existing fact].)[4]

[4] A subjective misinterpretation of a contract is, at most, a mistake of law. Under some circumstances such a mistake can provide a basis for rescission. (*Hedging Concepts, Inc. v. First Alliance Mortgage Co., supra,* 41 Cal.App.4th at p. 1421; Civ. Code, § 1578.) However, United did not allege and does not argue that rescission should have been granted based on a mistake of law.

C. There is no evidence of any mistake by United

There is an even more fundamental flaw with United's claim than the nature of United's mistake. As the party seeking rescission, United had the burden of proving that it had the requisite mistaken belief. It did not do so.

"In general, in reviewing a judgment based upon a statement of decision following a bench trial, 'any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]' [Citation.] In a substantial evidence challenge to a judgment, the appellate court will 'consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]' [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]" (*Estate of Young* (2008) 160 Cal.App.4th 62, 75–76.)

The court attached "no weight to Ross's assertion on the witness stand that, when United gave its buyout notice to POZ and Bedford in October, 2006, he (Ross) did not think United would be buying out defendants' interests in the Developer's Note because the Amended and Restated Agreement said the note was superseded."[5] There is no other relevant evidence of United's mistake.

United claims that the documentary evidence of this mistake is overwhelming and undisputed. We see no such evidence.

The trial court summarized the documents relied by United in its closing trial brief as: the Amended and Restated Agreement; Perry's letters to Quarles (Exh. 135 &136); the October 25, 2006 letter from POZ and Bedford's lawyers to United's lawyer ; plaintiff's appraisal (Exh. 365); the Scope of Engagement description POZ and Bedford's

[5] The trier of fact may disbelieve a witness on factors such as body language and tone of voice. We note that here, there was another reason for the court to disbelieve Ross. The Partnership carried the Note on its books for at least six years after the parties executed the Agreement.

appraiser's report (Exh. 138); POZ and Bedford's response to appraiser Hanlin's First Request for Information (Exh. 371); plaintiffs' briefs to Hanlin (Exh. 366) and POZ and Bedford's brief to Hanlin (Exh. 367). The trial court also considered the notice of conditional rescission sent by Ross on October 26, 2009. (Exh. 121)

Three of the documents were prepared by United's lawyers. Exhibits 135 and 136 are letters containing arguments by United's lawyer that the Developer's Note is not valid. Exhibit 366 is a legal brief. It argues the Developer's Note is not included in the interest being bought out. These arguments are not proof of United's understanding. The fourth document, Ross's notice of conditional rescission, was prepared in anticipation of litigation. It states: "United . . . believed that Mr. Hanlin's appraisal of POZ and Bedford's partnership interests would not include the Developer's Note." The remaining documents were prepared by POZ and Bedford or their lawyers and are not evidence of United's beliefs.

Although the court primarily focused on United's beliefs at the time it made its buy-out offer, the court also considered the parties beliefs in 1990 when they executed the Agreement. The court found "there is no evidence that the parties to the Agreement (Exh. 73) executed it under the shared assumption that the Developer's Note would not be a part of any appraisal of a former General Partner's General Partnership Interest as defined in section 1.21 of the agreement."

DISPOSITION

The judgment is affirmed. Defendants are to recover costs on appeal.

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KUMAR, J.[*]

We concur:

TURNER, P. J.

KRIEGLER, J.

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