

Filed 1/23/17 Butler Enterprises v. Superior Court CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BUTLER ENTERPRISES, L.P. et al.,

Petitioners,

v.

SUPERIOR COURT OF LOS
ANGELES COUNTY,

Respondent;

WEINTRAUB FINANCIAL
SERVICES, INC. et al.,

Real Parties in Interest.

B269092

(Los Angeles County
Super. Ct. No. BC529945)

ORIGINAL PROCEEDING; amended mandate petition.

Rita J. Miller, Judge. Petition denied.

Klapach & Klapach and Joseph S. Klapach for Petitioner.

No appearance for Respondent.

Doll Amir & Eley, Gregory L. Doll and Brett H. Oberst for
Real Parties in Interest.

I. INTRODUCTION

Cross-complainants filed an amended mandate petition challenging an order granting summary judgment on their first amended cross-complaint. Cross-complainants are: Butler Enterprises, L.P.; Frank W. Butler and Jean Butler as co-trustees for the Butler Family Trust; and Russell Berney, trustee of various other trusts. For clarity's purpose, we shall refer to cross-complainants as the Butler parties. Cross-defendants, Sebitna, LLC, Weintraub Financial Services, Inc. and Frank Weintraub, moved for summary judgment on the first amended cross-complaint. The summary judgment was final as to Weintraub Financial Services, Inc. and Mr. Weintraub. Sebitna, LLC has a pending second amended complaint against the Butler parties.

Our opinion in *Butler Enterprises, L.P. v. Weintraub* (Jan. 19, 2017, B268961) [nonpub. opn.] affirmed the summary judgment in favor of Weintraub Financial Services, Inc. and Mr. Weintraub. We dismissed the appeal as to Sebitna, LLC. We now take up the issue of the potential liability of Sebitna, LLC. The amended mandate petition also seeks relief as to Weintraub Financial Services, Inc. and Mr. Weintraub. We deny the Butler parties' amended mandate petition. And we do so as to Sebitna, LLC, along with Weintraub Financial Services, Inc. and Frank Weintraub, the cross-defendants named in the amended mandate petition.

II. BACKGROUND

The relevant factual and procedural history pertaining to this appeal were discussed in *Butler Enterprises L.P. v. Weintraub*. In summary, on November 2, 2010, Butler Enterprises L.P. entered into a purchase agreement with Weintraub Financial Services, Inc. Under the terms of the purchase agreement, Section 1.2 of the November 2, 2010 purchase agreement governs contingent future payments: “In addition to the Cash Purchase Price, Buyer shall pay to Seller ten percent (10%) (the ‘Contingent Payment’) of any and all monies, benefits . . . and any and all other consideration, paid to or received by Buyer, and/or Buyer’s successors, assigns, related parties . . . for any and all reasons, in connection with or related in anyway [sic] to the Property, as they are received by Buyer The Contingent Payment shall include payments and/or the receipt of funds in connection with the Property, made to or received by Buyer, Richard Weintraub, and/or any and all individuals or entities related, co-owned, controlled, partnered, or co-ventured with and/or otherwise affiliated with Buyer and/or Richard Weintraub, the relatives and/or family members of Richard Weintraub, and/or their respective successors and assigns, in whole or in part, directly or indirectly. Buyer shall handle such payments to Seller as a fiduciary, and provide full and complete accountings to Seller on at least a quarterly basis commencing the first quarter following the execution of this Agreement, and continuing until there are no further monies possibly due to Seller under the terms of this Agreement. Seller shall not be obligated or required to fund, pay and/or contribute anything to the ownership entity either or on account of the Property before or after sale of the Property to Buyer.”

Section 1.3 of the November 2, 2010 purchase agreement further provides: “The Contingent Payment shall not be due on the sale of an interest in the Property by a successor or assign of Buyer (a) who is truly and completely, directly and indirectly, independent of Buyer, Richard Weintraub and/or his relatives and/or family members and/or any and all entities owned in whole or in part by any of them, and (b) for which and to the extent a Contingent Payment has previously been paid to Seller for the full value of the interest sold or conveyed. The intent of this paragraph is that if Buyer or anyone related in anyway [sic] to Buyer sells an interest in the property to a truly independent party for full value, then the independent holder of that interest would not owe another Contingent Payment on the sale of that same interest; however, the intent is not to exclude payments on assignments or transfers by Buyer to related or affiliated entities or parties or to those who acquire an interest for less than full value.”

Section 20.1 of the November 2, 2010 purchase agreement governs indemnity, “Buyer shall indemnify and hold Seller harmless from and against any and all liens, claims, causes of action, damages, liabilities and expenses (including actual attorneys’ fees) arising out of Buyer’s inspections or tests of the Property or any violation of the provisions of this Agreement. Buyer’s indemnification and hold harmless obligations shall survive the termination of this Agreement and shall survive the Closing.”

In February 1, 2012, Weintraub Financial Services, Inc. sold its rights under the purchase agreement to Sebitna, LLC for \$215,000. Sebitna, LLC is a related entity to Weintraub Financial Services, Inc. and a California company. On April 16,

2012, Sebitna, LLC signed a letter of intent to sell its rights to the property to Hopactcong Developers for \$40,125,000. There is no evidence this sale occurred or that Hopactcong Developers paid Sebitna, LLC any money regarding the property.

On December 6, 2013, Sebitna, LLC and Weintraub Financial Services, Inc. initiated its action against the Butler parties alleging several causes of action pertaining to the purchase agreement, including contract breach. Sebitna, LLC and Weintraub Financial Services, Inc. filed their second amended complaint on October 9, 2014. Weintraub Financial Services, Inc. was later dismissed as a plaintiff.

On April 24, 2015, the Butler parties filed their first amended cross-complaint against Sebitna, LLC, Weintraub Financial Services, Inc. and Mr. Weintraub. Relevant to this amended mandate petition are the first and third causes of action in the first amended cross-complaint. For the first cause of action, the Butler parties allege Sebitna, LLC owes more than \$21,500 because it received a value that exceeded \$215,000. For the third cause of action, the Butler parties allege the indemnity provision of section 20.1 applies.

Sebitna, LLC, Weintraub Financial Services, Inc. and Mr. Weintraub moved for summary judgment. Sebitna, LLC, Weintraub Financial Services, Inc. and Mr. Weintraub contended they did not breach the contract or their fiduciary duty under section 1.2 of the purchase agreement. Sebitna, LLC, Weintraub Financial Services, Inc. and Mr. Weintraub also argued the Butler parties were not entitled to indemnity under section 20.1. The trial court granted summary judgment in favor of Sebitna, LLC, Weintraub Financial Services, Inc. and Mr. Weintraub. On January 11, 2016, the Butler parties filed their amended

mandate petition. We issued an order to show cause on January 15, 2016 concerning the order granting of the summary judgment motion.

III. DISCUSSION

We previously discussed the Butler parties' arguments in *Butler Enterprises, L.P. v. Weintraub*. The same reasoning applies here to Sebitna, LLC. As to the first cause of action, it is undisputed Sebitna, LLC never received any funds regarding a potential sale of the property to a third party. The Butler parties' position is that the payment of \$21,500 to it violated section 2.1 of the purchase agreement. The Butler parties argue they are entitled to a greater sum than \$21,500 up to the value of the property. This contention has no merit. Section 2.1 of the purchase agreement does not require a payment of the full value of the property. Sebitna, LLC, Weintraub Financial Services, Inc. and Mr. Weintraub correctly paid only \$21,500 to Butler Enterprises L.P. The \$21,500 figure is 10 percent of the \$215,000 paid by Sebitna, LLC to Weintraub Financial Services, Inc., the sum called for by section 2.1 of the purchase agreement. And as to the fiduciary breach claim, the issue has not properly been briefed in the amended petition and has thus been forfeited. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4; *Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 704, fn. 3.)

Regarding the third cause of action, section 20.1 of the purchase agreement does not apply here to the benefit of the Butler parties. The prevailing parties on the cross-complaint are Sebitna, LLC, Weintraub Financial Services, Inc. and Mr. Weintraub. Thus, at present, the Butler parties are not entitled to any attorney fees or indemnity. More to the point there has

been no breach of section 2.1 of the purchase agreement. The \$21,500 paid to the Butler parties is all they are entitled to at present. And, as we explained in the direct appeal from the order granting summary judgment, section 20.1, the indemnification provision, does not provide at right to attorney fee in a first party dispute. The Butler parties are entitled to no relief.

IV. DISPOSITION

The amended mandate petition is denied. Cross-defendants, Weintraub Financial Services, Inc., Sebitna LLC Weintraub, shall recover their costs incurred on appeal from cross-complainants: Butler Enterprises, L.P.; Frank W. Butler and Jean Butler as co-trustees for the Butler Family Trust; and Russell L. Berney as trustee for the Frank and Jean Butler Children's Holding, the David Butler Irrevocable, the Nancy Bear Irrevocable, the Mary Linn Irrevocable Trust, the Robert Butler Irrevocable, the Steven Butler Irrevocable and the Karen Butler Irrevocable Trusts.

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TURNER, P. J.

We concur:

KRIEGLER, J.

KUMAR, J. *

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