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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BISNO DEVELOPMENT
ENTERPRISE, LLC et al.,

Plaintiffs and Appellants,

v.

RYAN OGULNICK et al.,

Defendants and Respondents.

B282030

(Los Angeles County
Super. Ct. No. BC604495)

APPEAL from a Judgment of the Superior Court of Los Angeles County. Elizabeth R. Feffer, Judge. Reversed.

Law Offices of Robert H. Bisno and Robert H. Bisno for Plaintiffs and Appellants.

Allen Matkins Leck Gamble Mallory & Natsis, Melissa K. Zonne and Charles D. Jarrell for Defendants and Respondents.

Appellants Robert H. Bisno and Bisno Development Enterprise, LLC (Bisno) appeal from the trial court’s grant of summary judgment in favor of respondents Ryan Ogulnick (Ogulnick), Chris Lee (Lee), Dyer 18, LLC (Dyer 18), Dyer 18 Holding, LLC (Dyer Holding) and R20 Development, LLC (R20). Bisno, as Ogulnick’s attorney, entered into a real estate transaction with Ogulnick without observing the requirements of Rules of Professional Conduct, Rule 3-300 (Rule 3-300). Bisno argues on appeal that the trial court erred in failing to find a factual issue with respect to whether he rebutted the presumption of Probate Code section 16004, which governs transactions between lawyers and their clients.¹ We find that Bisno established a triable issue of fact exists whether he rebutted the Probate Code section 16004 presumption, and reverse.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Bisno is a member of the State Bar of California who participates in real estate acquisition, investment, and development. Since the late 1970s, he has been active in “entitlement” activities for real property, such as obtaining zoning changes, subdivisions, and tax abatements. During his 40 years in the real estate business, Bisno has been involved with the acquisition, development, entitlement and sale of more than 80 properties. BDE is an entity Bisno owns.

¹ He also argues that summary judgment is never appropriate in a Rule 3-300 case because the rebuttable presumption of Probate Code section 16004 creates a factual issue as a matter of law. Based on our resolution of the appeal, we need not decide this question.

Bisno had worked with Ogulnick on several real estate investments beginning in 2010, with Bisno providing Ogulnick with real estate-related services and advice. In particular, during the time period May 2012 through December 2012, Bisno represented Ogulnick in connection with a project known as VDC at the Met and in litigation involving an entity known as VDB Santa Ana LLC, which entity was the plaintiff in a pending action in Los Angeles County Superior Court.

Beginning in August 2011, because he was an attorney, Bisno believed it was necessary to advise Ogulnick that some of Bisno's consultation given in connection with real estate projects might constitute the practice of law. Bisno began to advise Ogulnick of potential conflicts of interest, the need for disclosure, and the need for an independent review of Bisno's relationship with Ogulnick. In Bisno's view, Ogulnick was a sophisticated business person who was adept regarding legal matters.

To that end, in August 2011, Bisno sent Ogulnick an email and related attachments. These documents included a letter dated August 9, 2011, from Bisno to Ogulnick (the "Professional Responsibility Letter"). In that letter, Bisno advised Ogulnick "the purpose of this letter is to set forth a variety of disclosures to avoid potential problems down the road. This letter also directs you to retain separate counsel to review our relationship, including, but not limited to the parts of that relationship where I am acting as a consultant (not as an attorney) and where I am acting as a partner, member of a limited liability company, or a similar relationship." Bisno attached three agreements relating to

project entities² discussed in the letter in which Bisno either had an interest or was representing Ogulnick and providing entitlement services. Bisno urged Ogulnick to have independent counsel review them. According to Bisno, Ogulnick indicated he understood the importance of reviewing the documents sent to him, and consulted with an attorney, J.T. Fox, regarding the documents.

During the period November 2011 to January 2012, Bisno and Ogulnick's independent counsel J.T. Fox communicated regarding the various agreements and made revisions to the Professional Responsibility Letter. Included among the revisions to the Professional Responsibility Letter was the deletion of the mention of the three projects. In January 2012, Ogulnick signed the Professional Responsibility Letter. The signed letter states that "I, Ryan Ogulnick, between August 9, 2011 and January 10, 2012, consulted independent counsel regarding this letter. I have been fully advised by such independent counsel." The letter further stated that Ogulnick believed "all transactions between me and [Bisno] are fair and reasonable to me." As revised, the letter did not specify or describe the nature of the transactions between the parties.

As a result of the Professional Responsibility Letter, when the Dyer Road property purchase came up later in 2012, Bisno believed that

² These entities were "VDC at the Met, LLC," "VDB Santa Ana, LLC," and "Vineyards Development Incorporated." The agreements were, respectively, an "Independent Contractor Agreement," a "Limited Liability Company Operating Agreement for VDB Santa Ana, LLC," and "Entitlement Representation: Geneva Commons/The Met, Santa Ana, CC."

he and Ogulnick were “proceeding with the understandings set forth in the ‘Professional Responsibility’ letters, which were signed by the parties.”

In October 2012, Ogulnick mailed Bisno a parcel map of an 18-acre parcel of real property located at 2001 East Dyer Road in Santa Ana and asked if Bisno wanted to work on the purchase, entitlement, and sale of the property. In connection with the Dyer Road property, Bisno asserted that he and Ogulnick agreed that they, or an entity in which they held a 50/50 interest, would purchase the property and obtain entitlements to build an apartment complex on it. This agreement was reached over the telephone and during meetings during the period November 2012 through March 2013. During the first quarter of 2013, the parties began to seek funding for the purchase, and prepared marketing materials regarding the project. Ogulnick continued to represent to Bisno that they were partners on the project.

However, according to Bisno, on December 16, 2013, Ogulnick secretly purchased the property for himself and others with defendant Lee and through the defendant entities Dyer 18, Dyer 18 Holdings, and R20. Ogulnick rebuffed Bisno’s request to honor their agreement regarding the property.

In December 2015, Bisno commenced this action against Ogulnick, Lee, Dyer 18, Dyer 18 Holding, and R20. Bisno’s operative first amended complaint alleged claims based upon Ogulnick’s repudiation of the agreement for breach of contract, fraud, and fraud in the inducement, intentional interference with contract, intentional interference with prospective economic advantage, negligent

interference with prospective economic advantage, breach of fiduciary duty, constructive trust/appointment of a receiver; quantum meruit, and accounting. Bisno alleged that the defendants formed the entities Dyer 18 and Dyer 18 Holdings and entered into separate agreements to purchase, entitle, and sell the property and then reap the benefits of those transactions for themselves, to the exclusion of Bisno.

As an affirmative defense, Ogulnick asserted that at the time of the transactions at issue, Bisno was acting as his attorney, Bisno failed to comply with the provisions of Rule 3-300, and Bisno breached his fiduciary duty to Ogulnick by failing to advise Ogulnick regarding the transaction. Ogulnick cross-claimed for declaratory relief, rescission, legal malpractice, and breach of fiduciary duty, asserting that Bisno had represented him in connection with the VDB Santa Ana, LLC matter and Bisno failed to comply with Rule 3-300.

Ogulnick moved for summary judgment, arguing that Bisno's violation of Rule 3-300 permeated all of the causes of action asserted in the first amended complaint, and such violation permitted Ogulnick to void the agreement regarding the Dyer Road property purchase, entitlement, and sale. (See *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135; *BGJ Associates v. Wilson* (2003) 113 Cal.App.4th 1217 (*BGJ Associates*).) Ogulnick asserted that Bisno did not disclose the terms of the transaction in writing and did not obtain Ogulnick's consent, thereby invoking the presumption of Probate Code section 16004 that Bisno breached his fiduciary duties to Ogulnick. Such presumption could not, as a matter of law, be rebutted because Bisno failed to advise

Ogulnick and failed to obtain Ogulnick's consent regarding the Dyer Road transaction.

In opposition, Bisno argued that (1) of the five defendants, only Ogulnick was his client, and thus his claims could proceed against the other four defendants; and (2) contrary to Ogulnick's assertion, there were triable issues of fact. These issues of fact related to whether Ogulnick was fully informed concerning the transaction and had sought independent advice, and the fairness of the transaction.

In support of his assertion that he had rebutted the Probate Code section 16004 presumption, Bisno submitted his own declaration and the declaration of Dennis Cavallari as a real estate expert. Cavallari, who had 30 years of real estate experience, asserted that the transaction was fair and reasonable. Cavallari believed the Dyer Road agreement, which was 50/50 in terms of power and economics, was, in terms of power structure, similar to the agreements relating to the other three entities. In those agreements, Ogulnick had more power than Bisno and thus the terms were more favorable to Ogulnick. With respect to economics, Cavallari believed it was a good deal for Ogulnick to receive 50/50 when Bisno was the far more experienced participant.

With respect to informed consent, Bisno asserted that he had, on numerous occasions, given Ogulnick the necessary advisements and obtained his consent with respect to the transaction.³ Bisno "constantly and continuously, before, during and after the initiation of entering into

³ Although the trial court sustained objections to portions of Bisno's declaration, these statements were not the subject of a sustained objection.

a purchase agreement for the [Dyer Road property], advised and requested Mr. Ogulnick to retain competent counsel, legal and otherwise, to review the specifics of the instant transaction and the entirety of Mr. Ogulnick's relationship, and of his entities' relationships to me, BDE, and any entity related to me. This included my giving advice the same against myself that I would give against others, in order to ensure Mr. Ogulnick understood all aspects of the transaction. I frequently had conversations with Mr. Ogulnick on the fairness of all of our dealings, including but not limited to the instant matter."

Bisno also stated in his declaration that "on an ongoing basis, I discussed with Defendants and their counsel J.T. Fox, and later other counsel, the need for an ongoing understanding regarding the potential conflicts given my role as both real estate professional and attorney and given the many common activities in which we were involved. Reflecting all of our states of mind, we agreed Mr. Fox would continue to represent Ogulnick on any potential conflict of interest matter or where they or I saw the need for Ogulnick to have independent review of any and all aspects of a transaction with me or any entity in which I had any connection. Mr. Ogulnick later consulted with other independent counsel regarding this and other transactions."

In reply, Ogulnick highlighted the lack of a writing to satisfy Rule 3-300's requirements, observing that the January 10, 2012 Professional Responsibility Letter did not disclose the terms of any particular transaction and predated the transaction at issue by nine months. Further, relying on *BGJ Associates, supra*, 113 Cal.App.4th at pages 1231–1232, Ogulnick asserted Bisno's failure to comply with the rule

applied to all defendants and all causes of action because Ogulnick's avoidance of the agreement meant there was no agreement to apply to any of the other four defendants. As a result, the burden was on Bisno to disprove the presumption he violated his fiduciary duty.⁴

The trial court granted summary judgment on the basis of the evidence submitted in defendants' separate statement. The court did not provide any other written reasons for its ruling, and Bisno did not provide a reporter's transcript of the hearing on the motion.

DISCUSSION

Bisno argues that the trial court erred because (1) any Rule 3-300 violation necessarily involves an analysis of Probate Code section 16004, yet here the trial court based its decision entirely on Bisno's violation of Rule 3-300, and (2) because Rule 3-300 imposes no civil liability for violation of its terms, it necessarily involves a consideration of Probate Code section 16004's rebuttable presumption and whether a triable issue was raised as to whether the presumption was rebutted. We conclude that Bisno raised a triable issue that he rebutted the presumption.

⁴ Ogulnick objected to portions of Bisno's evidence, including portions of his declaration. Bisno objected to portions of Ogulnick's evidence. The trial court sustained all of Ogulnick's objections to Bisno's evidence, and overruled Bisno's objections to Ogulnick's evidence. Bisno does not contest the trial court's evidentiary ruling on appeal.

I. *Standard of Review*

A motion for summary judgment is properly granted if “there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must present evidence that either conclusively negates an element of the plaintiff’s cause of action or establishes that the plaintiff does not possess, and cannot reasonably obtain evidence necessary to establish an element of the claim. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853-854.) If the defendant meets this burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. (Code Civ. Proc., § 437c, subd. (p)(2).)

We review the record de novo, “liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party.” (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) “We affirm the trial court’s decision if it is correct on any ground [that] the parties had an adequate opportunity to address in the trial court, regardless of the reasons the trial court gave.” (*Jameson v. Pacific Gas & Electric* (2017) 16 Cal.App.5th 901, 909.) For this reason, contrary to respondents’ assertion, the absence of a reporter’s transcript of the hearing on the motion for summary judgment is not fatal to this appeal. (*Fair v. Bakhtiari, supra*, 195 Cal.App.4th at pp. 1148–1149.) A reporter’s transcript may not be necessary if the appeal involves legal issues requiring de novo review. (*Southern California Gas Co. v. Flannery*

(2016) 5 Cal.App.5th 476, 483; *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 698–700 [transcript not necessary for de novo review of order granting an anti-SLAPP motions].)

II. *Triable Issues of Fact Exist Whether Bisno Rebutted the Probate Code Section 16004 Presumption of a Violation of His Fiduciary Duty*

A. *The January 2012 Letter Did Not Satisfy Rule 3-300, Raising the Rebuttable Presumption of Probate Code Section 16004*

Attorneys are fiduciaries who owe their clients the “most conscientious fidelity.” (*Fair v. Bakhtiari, supra*, 195 Cal.App.4th at p. 1140.) As a result, the law “takes a jaundiced view” of business transactions between attorneys and their clients. (*Ferguson v. Yaspan* (2014) 233 Cal.App.4th 676, 684.) However, although such transactions are disfavored, they are not prohibited. Rule 3-300 provides guidelines for lawyers entering into business transactions with a client, and a lawyer who fails to adhere to these guidelines is subject to discipline. (*Ibid.*)

Rule 3-300 requires an attorney who enters into a business transaction with a client to comply with its dictates: “A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: [¶] (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and [¶] (B) The client is advised in writing

that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and [¶] (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition." An attorney must satisfy all three requirements of Rule 3-300. (*Fair v. Bakhtiari, supra*, 195 Cal.App.4th at p. 1155.) The underlying concerns of the rule are avoiding the potential and actual conflicts of interest between attorneys and their clients that also animate the Rule's statutory counterpart, Probate Code section 16004. (*Fair v. Bakhtiari, supra*, 195 Cal.App.4th at p. 1163.)

Here, Bisno violated Rule 3-300 because there was no writing specifically addressing the Dyer Road property. The only writing pertaining to any disclosure made to Ogulnick, the January 10, 2012 letter, did not satisfy Rule 3-300's requirements of advice, consent and fairness. The letter lacked specificity concerning any transaction, did not mention the Dyer Road agreement, and predated the agreement by many months. As the language of Rule 3-300 makes clear, it applies to each individual transaction: "A member shall not enter into *a business transaction*" with a client, "unless . . . [t]he transaction . . . and its terms are fair and reasonable to the client and are fully disclosed . . . to the client . . . and . . . [t]he client thereafter consents in writing to *the terms of the transaction*." (Italics added.) Thus, a letter which omitted this salient fact could not satisfy Rule 3-300.

Although Bisno violated Rule 3-300, the Rule does not provide a statutory basis for liability; however, once the rule is violated, it

triggers the Probate Code section 16004 presumption. (*Fair v. Bakhtiari, supra*, 195 Cal.App.4th at p. 1155.) Probate Code section 16004 establishes a rebuttable presumption that transactions between an attorney and client whereby the attorney obtains an advantage are a breach of the attorney’s fiduciary duty and the product of undue influence.⁵ (*Ferguson v. Yaspan, supra*, 233 Cal.App.4th at p. 684.) An “advantage” within the meaning of Probate Code section 16004 occurs “[w]hen a fiduciary enters into a transaction with a beneficiary whereby the fiduciary’s position is improved, or he obtains a favorable opportunity, or where he otherwise gains, benefits, or profits.” (*Bradner v. Vasquez* (1954) 43 Cal.2d 147, 152.)

B. *Triable Issues Exist Whether Bisno Rebutted the Probate Code Section 16004 Presumption*

To rebut the presumption of the statute, the attorney must show that the transaction was fair and reasonable to the client, and that the client was fully advised. (*Ferguson v. Yaspan, supra*, 233 Cal.App.4th

⁵ Section 16004 provides in relevant part: “(a) The trustee has a duty not to use or deal with trust property for the trustee’s own profit or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to the beneficiary. [¶] . . . [¶] (c) A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee’s influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee’s fiduciary duties. This presumption is a presumption affecting the burden of proof. This subdivision does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee.” (See generally, *BGJ Associates, supra*, 113 Cal.App.4th at pp. 1227–1229; *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 917.)

at p. 685; *BGJ Associates, supra*, 113 Cal.App.4th at pp. 1227–1228.) The burden was therefore on Bisno, who violated Rule 3-300, to establish the transaction was fair and reasonable and that Ogulnick gave informed consent to Bisno’s participation in it. As some courts have noted, Probate Code section 16004 is a “complement” to Rule 3-300. If the attorney fails to rebut the presumption, the transaction is voidable at the client’s option. (*Ferguson v. Yaspan, supra*, 233 Cal.App.4th at pp. 684–685.)

Notably, Probate Code section 16004 does not contain a writing requirement, and no decision has required written consent to satisfy the burden of rebutting the section 16004 presumption. Thus, Bisno could rebut the presumption by a showing that his conversations and business dealings with Ogulnick established Ogulnick’s informed consent. Here, the portions of Bisno’s declaration to which the trial court did not sustain objections established a pattern of discussion with Ogulnick regarding the fairness of the transaction and its terms; such discussions were coupled with referral to outside counsel, Fox, who reviewed the transaction and found it acceptable. Bisno declared he continuously advised Mr. Ogulnick to retain competent counsel to review the specifics of the Dyer Road transaction and Ogulnick’s relationship with Bisno and any entity related to him. His advice “included . . . the same against myself that I would give against others, in order to ensure Mr. Ogulnick understood all aspects of the transaction. I frequently had conversations with Mr. Ogulnick on the fairness of all of our dealings, including but not limited to the instant matter.” Bisno also declared that he had ongoing discussions with the

defendants and their attorney (Fox as well as later counsel) regarding “the need for an ongoing understanding regarding the potential conflicts given my role as both real estate professional and attorney and given the many common activities in which we were involved. . . . [W]e agreed Mr. Fox would continue to represent Ogulnick on any potential conflict of interest matter or where they or I saw the need for Ogulnick to have independent review of any and all aspects of a transaction with me or any entity in which I had any connection. Mr. Ogulnick later consulted with other independent counsel regarding this and other transactions.”

This evidence raised a triable issue whether Ogulnick was fully advised concerning the specifics of the Dyer Property transaction and the need to obtain independent counsel. It also raised a triable issue whether he obtained such counsel, and whether, by continuing to work with Bisno (up until the time defendants purchased the property without Bisno’s participation) Ogulnick consented to Bisno’s participation.

With respect to fairness, the unopposed and admitted Cavallari declaration established the fairness and reasonableness of the Dyer Road transaction regarding power structure and economics. Because Bisno raised a triable issue whether the Dyer Road transaction was fair and whether Ogulnick was fully advised and consented to Bisno’s participation, Bisno also raised a triable issue whether the probate Code section 16004 transaction was rebutted. Thus, the grant of summary judgment must be reversed.

DISPOSITION

The judgment of the Superior Court is reversed. Appellants are to recover their costs on appeal.

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WILLHITE, Acting P. J.

We concur:

COLLINS, J.

MICON, J.*

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