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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JEFFREY DURAN et al., Plaintiffs and Respondents, v. EDWARD L. CAIN, JR., Defendant and Appellant.	B276097 (Los Angeles County Super. Ct. No. BC339947.DOC)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ernest M. Hiroshige, Judge. Reversed in part with directions and affirmed in part.

McCluskey & Montgomery, Kevin G. McCluskey, Gregg W. Brugger for Defendant and Appellant.

Gilbert Azafrani for Plaintiffs and Respondents.

Edward L. Cain, Jr. (Cain) appeals from the judgment entered in favor of respondent Rudy Durand (Durand) following a court trial on the fourth amended complaint.[1] Durand filed a complaint against Cain and others seeking damages related to a series of transactions in which Durand quitclaimed his real property to Cain in exchange for certain promises by Cain, and a "Compensation-Lien Agreement" in which Cain agreed to pay Durand for services he provided in connection with a lawsuit filed in federal court. The trial court entered judgment in favor of Durand for $1,138,556.88. We reverse the trial court's judgment for breach of the Agreement and affirm it in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

Cain and Durand met in the early 1980's and developed a close friendship. Durand considered Cain "to have a good background in business" and he relied on Cain for financial advice throughout their relationship.

In setting out the facts, we focus on the two principal contentions relevant to Cain's appeal.

A. Fraud/Financial Elder Abuse Claims Arising from the Refinancing of Durand's Condominium

In 1999, Durand purchased a condominium located at 324 North Palm Drive, Beverly Hills, California (the property). In 2003 and 2004, Cain assisted Durand in what Durand understood to be a refinancing of the

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[1] The fourth amended complaint also asserted claims on behalf of Durand's nephew, Jeffrey Duran (Duran), and against defendants First Coastal Bank, N.A. (First Coastal), Pagsta International, LLC (Pagsta), and Bank of America, N.A. (BANA). In addition, both Cain and BANA filed cross-complaints against Durand and others. Claims by and against Duran, First Coastal, Pagsta, BANA and the related cross-complaints are not part of this appeal.

property with a loan at a lower interest rate. The nature and extent of Cain's assistance to Durand in connection with that refinancing differed as evidenced by the testimony of the parties at trial.

1. Durand's testimony

In early 2003, Durand discussed with Cain refinancing the property. Durand was then working at Pagsta, a "motorcycle-related business" which Cain had formed and ran. Durand had agreed to work for Pagsta for $15,000 a month (and for a 10 percent interest in Pagsta), but Cain could not afford to pay him. Cain advised Durand that he had "a real tight connection with a friend of his in Atlanta that could refinance [the property]" at a lower interest rate. In lieu of a salary, Cain offered to help Durand refinance the property with his friend, make the payments on the new loan, and "take care of all the expenses" on the property. Durand understood that as part of the refinance process, he "would have to sign a bunch of papers that [Cain] would give [him] to sign."

On June 3, 2003, Durand executed a document entitled "Short Form Deed of Trust and Assignment of Rents (Individual)" (Deed of Trust) on the property. He received the document from Cain. Durand signed the Deed of Trust without reviewing it because he "trusted" Cain and signed "whatever he was told to sign" as part of the refinance process. The Deed of Trust referenced a debt in the sum of $400,000 which Durand owed to Cain.[2] Durand testified he did not owe Cain any money, and did not discover the

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[2] The Deed of Trust provides in pertinent part: "Purpose of Securing: . . . Payment of the indebtedness evidenced by one promissory note of even date herewith, and any extensions or renewal thereof, in the principal sum of $400,000 executed by Trustor [Durand] in favor of Beneficiary [Cain] by order."

reference to his owing Cain $400,000 until after he signed the Deed of Trust. When he confronted Cain about this supposed debt, Durand testified Cain told him "not to worry about it" because he "was always going to give [Durand] a piece of paper that [Durand] never owed [Cain] any money." Although Durand was confused about the situation, Durand "trusted" Cain and "relied upon his advice."

Continuing to rely on Cain's advice, Durand signed a quitclaim deed on October 28, 2003, transferring ownership of the property to Cain. He signed the document based on Cain's representation that "[Cain] needed to have some kind of equity in order to get [the property] financed." Prior to signing the quitclaim deed, Durand expressed his concern to Cain that he wanted to be "protected" in case something happened to Cain. Cain told Durand "he would give [him] a piece of paper that would protect [him] that it was [his property]." Durand was satisfied with Cain's arrangement.

Several months later, on January 2, 2004, Durand signed a residential lease agreement which granted him a lifetime lease on the property. Durand testified he signed the document based on Cain's representation that "in order for the loan to go through the bank needed a lease."

On April 20, 2004, the escrow closed on the refinanced loan which Cain had obtained on the property.

From April 2004 until October 2004, Durand testified he kept asking Cain when he was going to get the deed to his property back, and Cain kept "putting [him] off and putting [him] off." He then notified Cain, and his attorney, Geoffrey Mousseau (Mousseau), that he would no longer work for Cain until he received papers stating he "didn't owe any money and to get [his] deed back."

On October 11, 2004, Durand set up a meeting with Cain, Mousseau, and a notary, to sign the documents Cain had "promised" to give him. In that meeting, Cain signed a "Cancellation of Note"[3] which stated Durand did not owe Cain the amount of $410,000.[4] Cain also signed a quitclaim deed[5] transferring ownership of the property to Durand's nephew, Duran. Durand testified Cain initially refused to sign the quitclaim deed, claiming "tax problems." However, once Durand told him he no longer wanted to do business with him, Cain signed it. Because the notary had already left the meeting place, Durand testified he asked Mousseau to sign the quitclaim deed as a witness, and the lawyer did so.

In early 2005, Durand discovered there was an issue with his property. Prior to the closing of the loan refinancing transaction, and without Durand's knowledge, Cain had pledged the property as collateral for a loan on behalf of Pagsta from First Coastal. Durand received notice from First Coastal stating

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[3] The Cancellation of Note provides: "I, Edward L. Cain, Jr. hereby cancel [and] revoke that certain Promissory Note in my favor from Rudy Durand in the principal amount of $410,000.00. I intend by executing this document to declare that the sums, including any interest accrued or otherwise, required to be paid pursuant to the terms of the Promissory Note in my favor from Rudy Durand in the principal amount of $410,000.00 are no longer due and owing." Although the Cancellation of Note references a Promissory Note, Cain testified there never was a written document reflecting the loans made to Durand.

[4] Cain testified that in June of 2003, he loaned Durand an additional $10,000, thereby increasing the debt owed to $410,000.

[5] The quitclaim deed provides: "I, Edward L. Cain, Jr. hereby transfer and do remise, release and forever quitclaim to Jeff Durand [*sic*] all rights[,] title, and interest in and to that certain parcel of real property situated in Los Angeles County, State of California, described as 324 North Palm Dr. #403, Beverly Hills, California 90210."

the property was going to be repossessed because Pagsta had defaulted on a loan. First Coastal initiated litigation against Pagsta on the defaulted loan, culminating in a stipulated judgment in favor of First Coastal in the amount of $1,300,492.29. Durand thereafter sued First Coastal to prevent enforcement of its lien on the property. The parties settled that matter with an agreement that Durand pay First Coastal $175,000.

2. Cain's testimony

Cain testified he did not have any discussions with Durand in early 2003 about refinancing the property. Rather, in June 2003, Durand forwarded to him a copy of a Deed of Trust because Durand wanted to memorialize his debts owed to Cain. Over the course of their friendship, Cain made loans to Durand totaling $400,000, without any documentation. Cain understood the Deed of Trust gave him a "secure position" and put him "second behind the mortgage holder, for any equities in the property for $400,000."

Several months later, sometime between August and October, 2003, and separate from the Deed of Trust, Durand initiated a conversation about refinancing the property. Durand called Cain and explained he was experiencing major financial issues and having a difficult time making his mortgage payments.[6] Cain called his banker, who advised that if Durand's property went into foreclosure, the Deed of Trust securing the $400,000 in "loans" would become worthless. Cain's banker suggested one remedy to cure the issue would be for Durand to quitclaim the property to Cain, who could apply for a new loan on the property at a lower interest rate, and then Cain could rent the property back to Durand. This would benefit both parties

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[6] Durand denied being in financial trouble in 2003.

because Durand could stay in the property at a lower monthly payment, and Cain's collateral would be protected. Cain testified Durand liked the idea, and they decided to move forward with the refinancing process.

In October 2004, after escrow closed on the refinanced loan, Cain testified he signed a Cancellation of Note because it was part of his deal with Durand that in exchange for title to the property, he would cancel the debt owed to him by Durand.

On February 18, 2005, Cain testified that during a meeting with Durand and Mousseau (relating to Pagsta), Durand presented him with a quitclaim deed transferring title of the property to Durand's nephew, Duran. Cain was asked to sign the quitclaim deed even though it was dated October 11, 2004. Cain initially refused to sign the document because Durand owed him money. However, after Mousseau explained to him that an unnotarized quitclaim deed was not valid, Cain signed it, but instructed Mousseau to hold it until Durand paid Cain in full.

B. Breach of Contract Claim

In April 2003, Durand testified Cain approached him about a problem he had with H&R Block, Inc. (H&R Block) to see if Durand could help him. Durand agreed to assist Cain as a "consultant." He did not ask Cain to pay him for his services, although he was "expecting a compensation."

Cain hired Mousseau to file a lawsuit on his behalf against H&R Block. Mousseau testified that prior to his engagement, Durand had already been involved in "assembling, compiling, and preparing" boxes of documents in order to "prepare the complaint." Mousseau understood he could utilize Durand to assist him "in telling the story" because the lawsuit involved "a very complicated business transaction." He testified Durand "spent a considerable amount of time going through all of the documents" with him

and that there was a "great deal of editing back and forth on the factual allegations that were made as [the] complaint was being drafted." Durand also helped prepare a declaration to be signed by Cain that would be attached to the complaint. Cain considered Durand "an important part of the team."

On December 17, 2004, Cain's complaint against H&R Block and others was filed in the United States District Court for the Northern District of Georgia (Federal Action).

On December 20, 2004, Cain presented Durand with a written agreement entitled "Compensation-Lien Agreement" (Agreement), in which Cain assigned Durand "twenty percent (20%) of the proceeds of any recovery received by [Cain] as a result of the [Federal Action], whether by judgment or settlement or any other means." According to Durand, Cain told him: "This is for you for our friendship and all the work you've done for me with Pagsta and with my H&R Block lawsuit." Durand did not provide any assistance to Cain with respect to the lawsuit once it was filed.

On October 30, 2008, the Federal Action was dismissed without prejudice. Cain testified he engaged another law firm in Atlanta, which filed a new complaint against H&R Block and others in Fulton County Superior Court (State Action) on January 7, 2009. In April 2010, Cain settled the State Action with H&R Block for $4.325 million. Durand testified he did not receive any compensation from Cain for the services he had provided. According to Cain, "[Durand] wasn't entitled to anything on [the Federal Action] because [the State Action] was a completely different case."

C. The Instant Lawsuit

Durand's fourth amended verified complaint against Cain and others, filed in 2010 in Los Angeles County Superior Court, alleged causes of action for: (1) declaratory relief, (2) quiet title, (3) temporary restraining order and

preliminary injunction, (4) fraud, (5) financial elder abuse by fraud and wrongful foreclosure (financial elder abuse), (6) breach of contract, (7) common count-quantum meruit, and (8) common count-work, labor and services performed. Only Durand's claims for fraud, financial elder abuse and breach of contract are part of this appeal.

Following a court trial, on August 25, 2015, judgment was entered in favor of Durand and against Cain (the 2015 Judgment).[7] On May 12, 2016, an amended judgment was filed (the 2016 Judgment).

The 2016 judgment dismissed count 2 of the breach of contract claim (sixth cause of action); declared that the property belonged to Duran and quieted title in him (second cause of action); awarded Durand economic damages in the amount of $1,138,556.88 (fifth [financial abuse of an elder], sixth [breach of contract—counts 1 and 3], seventh [common count—quantum meruit], and eighth [common count—work, labor & services]) causes of action. The trial court also awarded prejudgment interest in the amount of $416,646.00, and reasonable attorney fees and costs of suit in amounts to be determined.

Pursuant to a request filed by Cain, the trial court issued a statement of decision in which it ruled "there existed a fiduciary relationship between Cain and [Durand], who were friends for over 20 years, and that Durand trusted Cain as a financial advisor." On the fraud claim, it ruled Cain induced Durand to execute the Deed of Trust, quitclaim deed, and residential

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[7] Cain thereafter filed a motion to vacate and enter a different judgment, which resulted in a ruling striking the award of punitive damages from the 2015 Judgment. Cain also filed a motion for new trial on the issue of noneconomic damages, as a result of which the award of such damages was also stricken from the 2015 Judgment. The trial court ordered Cain to file a new judgment in conformity with its rulings.

lease agreement based on the false claim it was necessary to sign the documents for the refinance process. The trial court also concluded Cain had failed to establish that Durand borrowed from, or owed any money to, Cain. As to the elder abuse claim, the trial court ruled Durand was an elder adult, and that Cain had taken the property for a wrongful use by secretly securitizing unpaid past loans to his own benefit, and pledging the property as collateral for the $1 million loan Cain had obtained on behalf of Pagsta. The trial court also held Cain's conduct was established by "clear and convincing evidence" and Cain intended to cause Durand harm by "malice, ill-will and spite."

On the breach of contract claim, the trial court ruled Cain's duty to perform on the promises contained in the Agreement was not excused because, based upon the covenant of good faith and fair dealing, the State Action was a continuation of the Federal Action.

Cain filed a timely notice of appeal.

CONTENTIONS[8]

Cain contends the trial court's judgment in favor of Durand as to the fraud, financial elder abuse, and breach of contract claims must be reversed because they are not supported by substantial evidence.

As to the fraud claim, he argues the written agreements Durand signed contained "clear and unambiguous language" consistent with his description of the transactions making unjustified Durand's reliance on his purported misrepresentations. Based on his contention that the evidence admitted at trial did not support the fraud claim, Cain argues the financial elder abuse claim also fails as "there [was] no underlying tort upon which to base Cain's liability." Cain further argues the financial elder abuse claim must be reversed because he did not "wrongfully retain[] title to the [property] for [a] wrongful use."

As to the breach of contract claim, Cain contends the Agreement "constituted, at most, an unenforceable promise to make a gift" since "the consideration for Cain's promise (Durand's services) was not bargained for [and] consisted of past services only." He also contends that even if the

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8 Durand contends we must affirm the trial court's judgment because Cain failed to file an answer to the verified fourth amended complaint, thereby admitting "every specific averment in said sworn complaint." (Emphasis omitted.) We disagree. Because Durand chose to proceed to trial on the merits of his claims, he waived the right to challenge Cain's failure to file an answer. (*Madison v. Octave Oil Co.* (1908) 154 Cal. 768, 770-771 [defendant's decision to proceed to trial on its cross-complaint after the trial court entered the default of plaintiffs waived on appeal the issue of whether defendant was entitled to a default judgment]; *Brown v. Pacific Tel. & Tel. Co.* (1980) 105 Cal.App.3d 482, 486 ["a plaintiff could waive the entry of a defendant's default by accepting pleadings from a defendant or proceeding with the litigation by trial"].)

Agreement were an enforceable contract, Durand would not be entitled to any payment because "the contingency specified [in the Agreement], settlement of an action against H&R Block filed in federal court in Georgia, did not occur." To the extent the Agreement applies and has been breached, Cain contends Durand should only be entitled to either a quantum meruit measure of damages or a contingency fee of 20 percent of the proceeds actually received by Cain.

DISCUSSION

I. Standard of Review

"In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo. [Citation.] We apply a substantial evidence standard of review to the trial court's findings of fact. [Citation.] Under this deferential standard of review, findings of fact are liberally construed to support the judgment and we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings. [Citation.]" (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.)

II. The Trial Court Did Not Err in Ruling Cain Is Liable to Durand for Financial Elder Abuse

The elements of a claim for financial elder abuse are determined by the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act) (Welf. & Inst. Code, § 15600 et seq.)[9] Under the Elder Abuse Act, an elder is

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[9] All further statutory references are to the Welfare and Institutions Code.

defined as any person residing in California who is 65 years of age or older.[10] (§ 15610.27.) Financial abuse of an elder occurs when a person or entity "[t]akes, secretes, appropriates, or retains real or personal property of an elder . . . to a wrongful use or with intent to defraud, or both." (Former § 15610.30, subd. (a)(1).)[11] A person or entity is "deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith." (Former § 15610.30, subd. (b).) "Bad faith" occurs when "the person or entity knew or should have known that the elder . . . had the right to have the property transferred or made readily available to the elder . . . or to his or her representative." (Former § 15610.30, subd. (b) (1).)[12]

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[10] Durand was over the age of 65 at the time he executed the documents transferring title of the property to Cain.

[11] The current version of section 15610.30 does not apply to Durand's claim. In 2008, the Legislature made substantive amendments to former section 15610.30, which were not retroactive in effect. (*Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727, 736-737.)

[12] Although not raised by the parties, we note "courts are divided over whether [the Elder Abuse Act] create[s] independent causes of actions or merely enhance[s] the remedies available under preexisting causes of action. (See *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664-666 [discussing division of authority concerning § 15657, which addresses physical abuse of an elder]; Balisok, Elder Abuse Litigation [The Rutter Group 2009] ¶ 8:9, p. 8-5 . . . ['Whether "financial abuse" amounts to a new cause of action or whether it is remedial is an important question.'].)" (*Das v. Bank of America, N.A.*, *supra*, 186 Cal.App.4th at pp. 743-744.)

In deciding this issue, we reviewed former section 15657, which provided: "Where it is proven by clear and convincing evidence that a defendant is liable for . . . financial abuse as defined in Section 15610.30, and that the defendant has been guilty of recklessness, oppression, fraud, or

Cain contends the trial court's ruling he committed financial elder abuse was in error because there was no support for the finding he took title to the property for a "wrongful use." He argues the evidence was "consistent with [his] description of the transactions as being a sale and lease back of the [property] in exchange for cancellation of Durand's debt to [him]."

Although the trial court ruled he improperly securitized a disputed monetary claim to his own benefit by inducing Durand to execute the Deed of Trust under "false pretenses," Cain contends the evidence shows Durand voluntarily signed the Deed of Trust, thereby "admitt[ing] to the loans and voluntarily grant[ing] [him] a security interest." Cain also contends the trial court erred in finding that pledging the property as collateral for a $1 million loan was a further "wrongful use." Because he was "undisputedly the titleholder to the [property]" at the time he applied for the loan on behalf of Pagsta, Cain contends he "had the right to use his property to back his personal loan guarantee."

Cain's contentions are unsupported. His arguments are dependent upon accepting his version of the evidence, which the trial court rejected.

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malice in the commission of this abuse, in addition to all other remedies otherwise provided by law: [¶] (a) The court shall award to the plaintiff reasonable attorney's fees and costs." Thus, in order to be held liable for financial elder abuse, the statute makes clear only the elements set forth in section 15610.30 must be proven; there is no mention that proof of an underlying tort is also needed to establish a claim. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562 ["Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history."].) We therefore conclude a violation of the Elder Abuse Act constitutes an independent cause of action, as did our colleagues in Division Five in *Perlin v. Fountain View Management, Inc., supra*, 163 Cal.App.4th at page 666.

"This court cannot reweigh the evidence and reach a contrary factual determination." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60.)

Durand testified he signed the Deed of Trust and quitclaim deed because he believed Cain's misrepresentations that the documents were part of the refinance process. Cain instead used the documents "to his own benefit and without Durand's knowledge or consent." This evidence was sufficient to support the trial court's ruling Cain committed financial elder abuse.[13] (*Wood v. Jamison* (2008) 167 Cal.App.4th 156, 164-65 [an attorney and another man committed financial elder abuse when they colluded to persuade an elder to make an investment in a nightclub]; *Thompson v. Asimos*, *supra*, 6 Cal.App.5th at p. 981 ["A single witness's testimony may constitute substantial evidence to support a finding."].) We therefore affirm the trial court's judgment in favor of Durand for violation of the Elder Abuse Act.[14]

III. The Trial Court Erred in Ruling Cain Breached the Agreement

The rules governing the interpretation of written agreements are well established.[15] "The interpretation of a contract is a judicial function.

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[13] The standard at the trial level, clear and convincing evidence, does not alter our standard of review because "all we are required to find is substantial evidence to support a determination by clear and convincing evidence [citation] . . . ." (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287.)

[14] Based on our ruling, and considering the trial court's award of damages for fraud and financial elder abuse claim is the same, it is unnecessary for us to address Cain's contentions with respect to the fraud claim.

[15] We will interpret the Agreement under California law, which neither party appears to contest. (*Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 919 [""[G]enerally speaking the forum will apply its

[Citation.] In engaging in this function, the trial court 'give[s] effect to the mutual intention of the parties as it existed' at the time the contract was executed. [Citation.] Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract's terms. [Citations.]" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1125-1126.) If a contract is ambiguous on its face, or if parol evidence shows that it is reasonably susceptible to two or more interpretations, extrinsic evidence may be considered. (*Bill Signs Trucking, LLC v. Signs Family Limited Partnership* (2007) 157 Cal.App.4th 1515, 1521.) Extrinsic evidence is admissible if it "is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.)

The Agreement states Durand is entitled to the proceeds of any recovery received by Cain as a result of the "Case." The term "Case" is defined in the Agreement as "the lawsuit entitled Cain, et al. v. H&R Block, et al., in the United States District Court for the Northern District of Georgia, Atlanta Division." Thus, the word "Case" as used in the Agreement unambiguously refers to the Federal Action, which means Durand's right to payment is triggered only if there were a settlement or judgment *in the Federal Action*. Despite this clear language, the trial court ruled "the covenant of good faith and fair dealing" required that Cain's obligation to pay Durand 20 percent of the proceeds of the amount recovered in the Federal Action also applied to any recovery obtained in the State Action; thus Durand

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own rule of decision unless a party litigant timely invokes the law of a foreign state.'"'"].)

was entitled to an equal payment from the proceeds of the State Action settlement. We disagree.

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. . . . It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350, original italics; *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1032 ["[T]he implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract."].) Thus, "'[c]ourts cannot make for the parties better agreements than they themselves have been satisfied to make or rewrite contracts because they operate harshly or inequitably as to one of the parties.'" (*Cousins Inv. Co. v. Hastings Clothing Co.* (1941) 45 Cal.App.2d 141, 147 [reversing trial court's ruling the implied covenant required defendant to remain in business on the premises until the expiration of the lease when the express terms of the lease contained no such requirement].)

Applying these principles, we cannot conclude there was an implied obligation that Cain pay Durand 20 percent of the proceeds of the settlement of the State Action. The terms of the Agreement are clear, unambiguous and definite. By entering into the Agreement, Durand assumed the risk he would receive no payment for his services if there were no settlement or judgment in the Federal Action, which is what occurred. As Cain points out, "[h]ad the parties to the [Agreement] wished to broaden the scope of the defined term

'Case', they could have done so by referring to 'claims' arising out of the facts alleged in the Federal Action or similar language. This was not done."

We therefore reverse the trial court's judgment in favor of Durand for breach of the Agreement.[16]

DISPOSITION

The judgment is reversed as to Durand's claim for breach of the Compensation-Lien Agreement. The trial court is directed to vacate its award of damages and of prejudgment interest in favor of Durand with respect to any recovery based on the Agreement. In all other respects the judgment is affirmed. The parties are to bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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[16] Based on the foregoing resolution of issues, we do not consider Cain's other contentions raised on appeal with respect to the Agreement.

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