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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PNG INVESTMENTS, INC.,

Plaintiff, Cross-defendant
and Respondent,

v.

RG REAL ESTATE INVESTMENTS
et al.,

Defendants, Cross-
complainants and Appellants.

RG REAL ESTATE INVESTMENTS
et al.,

Cross-complainants and
Appellants,

v.

PAULINE MACARENO,

Cross-defendant and
Respondent.

B280229

Los Angeles County
Super. Ct. No. PC055993

APPEAL from a judgment of the Superior Court of Los Angeles County, Melvin D. Sandvig, Judge. Affirmed in part, reversed in part.

John Schlanger for Defendants, Cross-complainants and Appellants.

Forry Law Group and Craig B. Forry for Plaintiff, Cross-defendant and Respondent PNG Investments, Inc., and Cross-defendant and Respondent Pauline Macareno.

INTRODUCTION

Plaintiff and cross-defendant PNG Investments, Inc. (PNG) sued defendants and cross-complainants RG Real Estate Investments (RG) and Surya Gupta (collectively, Defendants) for fraud, breach of contract, wrongful foreclosure, and declaratory relief in connection with a real estate loan transaction. After a bench trial, the court found in favor of PNG on its claims and against Defendants on their cross-claims. The judgment awarded PNG declaratory relief, \$25,000 in damages on the fraud claim, and contractual attorney fees. Defendants appeal from the judgment. We reverse on the fraud claim, and affirm in all other respects.

FACTS AND PROCEDURAL BACKGROUND

Consistent with our standard of review, we state the facts established by the evidence in the light most favorable to the trial court's findings. (See *Estate of Young* (2008) 160 Cal.App.4th 62, 75-76; *In re Marriage of Ruelas* (2007) 154 Cal.App.4th 339, 342 [" 'Where [the] statement of decision sets forth the factual and legal basis for the decision, 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.' "].)

PNG is a real estate investment company owned by its president, Pauline Macareno. The company purchases residential properties (typically with funds it borrows from non-conventional lenders), rehabilitates the properties, and resells the properties for a profit.

In 2011, PNG began borrowing money from Gupta's company, RG. From June 2011 to May 2012, PNG obtained and repaid five loans from RG for the purchase, rehabilitation, and resale of five residential properties. The terms of each loan were set forth in individual promissory notes, with annual interest rates ranging from 6 to 20 percent. None of the notes required PNG to share a portion of its resale profits with RG as a term of repayment.

In September 2012, Jeannie Rouse, an escrow officer with Investor's Title Company, opened an escrow for PNG's purchase of a property on Leach Street in Sylmar (the Sylmar Property). Macareno had arranged to finance the Sylmar Property's purchase and rehabilitation with a loan from Anchor Loan, at a 12 percent annual interest rate for a term of 11 months. However, in mid-October, Gupta approached Macareno about his interest in the transaction, and he promised her "way better terms" if she would finance the purchase through RG. At the time, Macareno did not know the exact terms RG would offer, but she nevertheless cancelled the loan with Anchor and advised Rouse that RG would be the lender for the Sylmar Property purchase.

On September 12, 2012, RG wire-transferred a \$4,700 earnest money deposit to escrow for the Sylmar Property. Gupta's accompanying wire instructions stated, under the heading "ADDITIONAL LOAN ESCROW INSTRUCTIONS

FROM LENDER”: “Promissory Note shall provide 6% p.a. interest with Pauline Macareno and Hopevale Development as obligors and shall be due and payable in six months.”¹

On October 20, 2012, Macareno emailed Rouse to advise her that RG would be wiring \$264,000 to escrow in the next few days. Of that amount, \$239,000 was to pay for the purchase and accompanying fees, while the remainder (\$25,000) was to be paid to Hopevale at closing to fund the rehabilitation of the Sylmar Property. As for the loan’s terms, Macareno wrote it would be a “Straight Note 6 month note [*sic*] [at] 6 percent no points or fees with a loan amount of acquisition price.”

On October 23, 2012, RG wire-transferred \$264,000 to escrow for the Sylmar Property. In the wire instructions, again under the heading “ADDITIONAL LOAN ESCROW INSTRUCTIONS FROM LENDER,” Gupta wrote: “Promissory Note evidencing this loan shall be personally guaranteed by Pauline Macareno and provide for 6% p.a. interest commencing April 1, 2013, plus 50% profit. Note shall be due and payable in six months and secured by a 1st deed of trust.”

The same day, on October 23, 2012, Macareno signed a deed of trust for the Sylmar Property on behalf of PNG. The deed of trust listed RG as the beneficiary and stated it was “For the Purpose of Securing . . . Payment of the indebtedness evidenced by one promissory note of even date herewith . . . in the principal sum of \$235,299.00 executed by [PNG] in favor of [RG].” Although Macareno believed RG would prepare a promissory note

¹ Hopevale was another company Macareno operated to rehabilitate properties.

when she executed the deed of trust, RG never did so, and a promissory note was never deposited into escrow.

On October 26, 2012, Rouse closed the Sylmar Property escrow and recorded the deed of trust. Rouse testified that she had not seen Gupta's October 23, 2012 wire instructions when she recorded the deed of trust, and, although she had seen the terms set forth in Macareno's October 20, 2012 email, she had not received confirmation that the parties agreed upon those terms for the promissory note. Rouse admitted she made a mistake by recording the deed of trust without first receiving a copy of the note.

After receiving a closing statement, Macareno contacted Gupta to let him know escrow had closed without a promissory note. Gupta told her, " 'don't worry,' " and assured her, " 'I'll take care of you.' " Because she had not had issues in her past dealings with RG, Macareno relied upon Gupta's assurances and moved forward with rehabilitating the Sylmar Property.

In April 2013, PNG entered escrow to sell the Sylmar Property. Macareno contacted Gupta to request a payoff demand, but by this point their business relationship had gone " 'South' " due to problems with another transaction, and Gupta demanded 50 percent of the profits from the resale in addition to 6 percent interest on the loan. Although Macareno had never agreed to pay a share of the profits as part of the Sylmar Property transaction or any of PNG's prior transactions with RG, she ultimately acceded to Gupta's demand.

On May 21, 2013, Macareno sent Gupta an email offering \$307,450 to extinguish RG's lien on the Sylmar Property. The amount included \$38,250, constituting a 50 percent share of PNG's gross resale profits. Gupta affirmed in a reply email that

RG would accept \$307,450 as the payoff amount. However, despite persistent efforts by the escrow officer to obtain a formal payoff demand, Gupta and RG failed to provide the required documentation, and the escrow was cancelled.

In September 2014, PNG attempted to obtain a refinance loan to extinguish RG's lien on the Sylmar Property. On September 8, 2014, RG sent a \$418,000 payoff demand to PNG that included amounts for foreclosure fees, registration and legal fees, 50 percent of rental income at a rate \$3,000 per month for 22 months, and a share of profits based on an estimated resale price of \$420,000. Macareno objected that PNG had never agreed to these additional terms and refused RG's demand. In response, RG refused to re-convey the deed of trust.

On April 21, 2014, RG commenced foreclosure proceedings by recording a notice of default on the Sylmar Property. On July 13, 2014, RG recorded a notice of trustee sale.

On October 7, 2014, PNG filed its complaint against RG and Gupta, asserting causes of action for breach of contract, fraud, wrongful attempted foreclosure, and declaratory and injunctive relief. On November 19, 2014, PNG filed an application for a temporary restraining order to prevent the trustee sale. The trial court granted the restraining order and set an order to show cause hearing regarding issuance of a preliminary injunction. On December 8, 2014, the court granted the preliminary injunction.

On July 15, 2015, RG and Gupta filed a cross-complaint against PNG and Macareno, asserting causes of action for breach of oral agreement, money lent, fraud, elder abuse, and constructive trust. The cross-complaint alleged Macareno and PNG orally agreed to repay RG's loan for the Sylmar Property in

six months, at an annual interest rate of 6 percent, and to pay 50 percent of the net profits derived from the Sylmar Property resale. Additionally, the cross-complaint requested an award of attorney fees under a fee provision in the deed of trust.

On September 12, 2016, the court commenced a three-day bench trial on the complaint and cross-complaint. In a written statement of decision, the court found RG and Gupta liable on PNG's claims for breach of contract, fraud, wrongful attempted foreclosure, injunctive relief, and declaratory relief. As for the cross-complaint, the court found RG and Gupta failed to meet their burden of proof.

With respect to the breach of contract, wrongful attempted foreclosure, injunctive relief, and declaratory relief claims, the court awarded PNG equitable, rather than monetary, relief, declaring, "the Deed of Trust will be in the principal amount of \$268,700, plus six percent (6%) interest per annum going forward from the date the Judgment is entered and payable in full, principal and interest, at the end of the six month period thereafter." On the fraud claim, the court awarded PNG \$25,000 in damages.

The court found PNG to be the prevailing party on all causes of action in the cross-complaint related to the deed of trust, and awarded PNG \$146,960 in fees.

DISCUSSION

1. *Standard of Review*

In a substantial evidence challenge to a judgment after a court trial, 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]." (*Howard v. Owens Corning* (1999) 72

Cal.App.4th 621, 630; *Estate of Young, supra*, 160 Cal.App.4th at p. 76.) We do not reweigh the evidence and are bound by the trial court's credibility determinations. (*Howard*, at p. 631; see *Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1384.) Findings of fact are liberally construed to support the judgment. (*Winchell v. Lambert* (1956) 146 Cal.App.2d 575, 581; *Estate of Young*, at p. 76.)

2. *The Evidence Was Insufficient to Support the Damages Award on PNG's Fraud Claim*

The trial court found RG and Gupta jointly and severally liable for fraud, and awarded PNG \$25,000 in damages. In its statement of decision, the court explained its liability finding: "Fraud was evidenced by the malicious conduct of the defendants by their failure to complete the promissory note or at least confirming that the promissory note was completed. Financing the [Sylmar] Property and then using this fact to try to extort additional money from PNG Investments by pressing demands for payment when the [Sylmar] Property was in escrow to sell in May 2013, and failing to present the demand sufficient for the [Sylmar] Property escrow to close constitutes additional evidence of fraud." The court gave no explanation as to how it arrived at the \$25,000 damages figure.

"The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." (*Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal.4th 979, 990.) Although Macareno's testimony was sufficient to prove she reasonably relied on Gupta's representation that he would prepare a promissory note with "way better terms" than those

Anchor had offered, we can find no evidence in the record to establish PNG suffered \$25,000 in damages as a result.

When a contract is formed upon a fraudulent misrepresentation, “unless the plaintiff merely seeks to rescind the contract, it must suffer actual monetary loss to recover on a fraud claim.” (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240; *Empire West v. Southern California Gas Co.* (1974) 12 Cal.3d 805, 810, fn. 2 [fraud without damage furnishes no ground for action].) “There are two measures of damages for fraud: out of pocket and benefit of the bargain. [Citation.] The ‘out-of-pocket’ measure of damages ‘is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The “benefit-of-the-bargain” measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.’” (*Alliance Mortgage*, at p. 1240.)

Regardless of which measure is used, we can find no evidence in the record to support the court’s \$25,000 damages award. While the court appears to have been understandably troubled by Defendants’ apparent attempt to take advantage of the missing note by extorting concessions from PNG, there was no evidence that PNG lost any benefit that it otherwise would have enjoyed if Gupta’s false representation about the promissory note had been true. It is true that PNG did not complete the May

2013 sale. But it is also the case that PNG still owned the Sylmar Property, and there was no evidence that the property's value declined after May 2013 so as to deprive PNG of any profits upon resale.

Moreover, as Defendants emphasize in their opening brief, notwithstanding Gupta's misrepresentation, the missing note allowed PNG to maintain ownership and collect rents from the Sylmar Property *without paying interest* on RG's loan for more than four years. PNG's only response is the unsupported assertion that "[s]ubstantial evidence regarding RG and Gupta's fraud on PNG's attempts to pay-off the Deed of Trust support the award of damages of \$25,000." Even drawing all favorable inferences to uphold the court's finding, we simply cannot agree. The evidence was insufficient to support the damages award.

3. *Substantial Evidence Supports the Declaratory Relief Claim*

RG does not challenge the trial court's ruling on PNG's declaratory relief claim. However, the relief the court granted on that cause of action was identical to the relief it granted on PNG's breach of contract, wrongful attempted foreclosure, and injunctive relief claims—i.e., a declaration that "the Deed of Trust will be in the principal amount of \$268,700, plus six percent (6%) interest per annum going forward from the date the Judgment is entered and payable in full, principal and interest, at the end of the six month period thereafter." It is settled that, "[w]hen a case has been presented on alternate theories, [a judgment] will be upheld against a challenge to the sufficiency of the evidence if the evidence supports the verdict on any one of the causes of action or theories of liability." (*Travelers Ins. Co. v. Leshner* (1986) 187 Cal.App.3d 169, 195 (*Travelers*), disapproved on other grounds by

Buss v. Superior Court (1997) 16 Cal.4th 35, 50; accord, *Continental Dairy Equip. Co. v. Lawrence* (1971) 17 Cal.App.3d 378, 383; see also *Roberts v. Ford Aerospace & Communications Corp.* (1990) 224 Cal.App.3d 793, 799 [applying “two issue” rule to special verdict].) Under this principle of appellate review, RG’s failure to present a reasoned argument challenging the declaratory relief verdict is alone sufficient to affirm the judgment. (See, e.g., *Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn. 1.) Be that as it may, we will briefly discuss the declaratory relief claim and the evidence that supports the court’s ruling.

“The purpose of declaratory relief is ‘to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs.’” (*Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 884 (*Sierra County*)). To this end, Code of Civil Procedure section 1060 provides: “Any person interested under a written instrument, . . . or who desires a declaration of his or her rights or duties with respect to another . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action . . . for a declaration of his or her rights and duties in the premises The declaration may be either affirmative or negative in form and effect, and the declaration shall have the force of a final judgment. The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.”

“Whether a claim presents an ‘actual controversy’ within the meaning of Code of Civil Procedure section 1060 is a question of law that we review de novo.” (*Sierra County, supra*, 158 Cal.App.4th at p. 885.) “Once an ‘actual controversy’ exists, it is within the trial court’s discretion to grant or deny declaratory

relief, and a reviewing court will not disturb that exercise of discretion absent abuse.” (*Ibid.*) With respect to the relief that may be granted, we likewise review the trial court’s exercise of its equitable authority under the abuse of discretion standard. (*Lortz v. Connell* (1969) 273 Cal.App.2d 286, 300 [“trial court has discretion as to the extent of relief to be afforded in a proceeding for declaratory relief”]; *Bess v. Park* (1955) 132 Cal.App.2d 49, 53 [“declaratory relief being an equitable proceeding the trial court can in its discretion grant that relief in order to liquidate uncertainties and controversies which might result in future litigation”].) And, “we defer to the trial court’s findings of fact if they are supported by substantial evidence.” (*Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.* (2007) 148 Cal.App.4th 1023, 1031 (*Diablo Valley*).)

There is no dispute that an actual controversy existed between RG and PNG concerning the deed of trust and the terms of the loan it secured. In an email to Rouse before executing the deed of trust, Macareno stated the loan would be a “Straight Note” with a six-month term and a 6 percent interest rate.² However, Gupta maintained RG was entitled to repayment on the terms set forth in his wire transfer instructions to Rouse—a six-month loan, at 6 percent interest, *plus 50 percent of the profits from the Sylmar Property sale*. Rouse testified that she did not receive RG’s wire instructions before the escrow closed, and she did not have any documents in her escrow file that described the actual terms under which RG loaned funds to PNG.

² Macareno testified she based the email on a conversation she had with Gupta in which he suggested the loan terms would actually be “better” than the six-month, 6 percent loan she outlined in her email to Rouse.

In declaring the loan would be for six months with a 6 percent interest rate from the date of the judgment, the trial court resolved the controversy in favor of PNG. The decision was supported by substantial evidence. Contrary to RG's position, Macareno testified that she did not agree to pay 50 percent of the resale profits before the deed of trust was recorded. She said Gupta had assured her he would provide "way better" terms than the 12 percent interest rate she had already secured from Anchor, and she cancelled the Anchor loan only because Gupta offered her that assurance. Consistent with Macareno's testimony, the evidence showed that none of RG's five previous loans to PNG had a profit sharing provision. And, Gupta's wire instructions for the initial earnest money deposit did not provide for a share of the profit, stating only "Promissory Note shall provide 6% [per annum] interest . . . and shall be due and payable in six months." As for her May 21, 2013 email, Macareno testified that she acceded under duress to RG's demand for a 50 percent share of the profits because Gupta had threatened to withhold his payoff demand unless she agreed. Although Gupta offered a different account of the parties' agreement, it was the trial court's charge to resolve the conflict, and we are bound by the court's factual findings, so long as they are supported by substantial evidence. (*Diablo Valley, supra*, 148 Cal.App.4th at p. 1031.)

The trial court also reasonably exercised its equitable discretion to deny RG prejudgment interest. The evidence showed that, in May 2013, PNG attempted to complete a sale of the Sylmar Property and pay off the RG loan. But despite PNG's and the escrow officer's repeated attempts to obtain a formal payoff demand, RG failed to provide the required documents and the sale fell through. Because RG's neglect and unfair conduct,

both with respect to the absent promissory note and the payoff demand, frustrated PNG's efforts to extinguish the lien in a timely manner, the trial court had a reasonable basis to defer the accrual of interest until after the entry of judgment.

With the exception of the fraud claim that we have already discussed, the evidence and findings supporting the declaratory relief ruling are alone sufficient to affirm the judgment. Thus, we need not address RG's arguments concerning the breach of contract, wrongful attempted foreclosure, and injunctive relief claims. (See *Travelers*, *supra*, 187 Cal.App.3d at p. 195.)

4. *Defendants Have Not Demonstrated Reversible Error with Respect to Their Cross-Complaint*

RG and Gupta contend the court should have awarded them damages on their cross-complaint, arguing in cursory fashion that "all of the evidence" stated in the factual background to their opening brief was "more than enough evidence for a finding that PNG took advantage of the absence of a promissory note . . . to avoid making any payment to RG, and that RG was thereby damaged." As we have discussed, RG and Gupta have the obligation as appellants to present an argument and legal authority on each claim of error raised in their appeal, and this requires "more than simply stating a bare assertion that the judgment, or part of it, is erroneous and leaving it to the appellate court to figure out why." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2017) ¶ 8:17.1, p. 8-6, citing *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.) This obligation extends to their presentation of the factual record, and requires Defendants to summarize all evidence on a challenged factual finding, both favorable and unfavorable, and show why that evidence was insufficient to

support the court's resolution of a disputed factual issue. (*Trailer Train Co. v. State Bd. of Equalization* (1986) 180 Cal.App.3d 565, 587.) Here, Defendants' factual summary fails to address much of the evidence we discussed with respect to the declaratory relief claim, even though that evidence also plainly supported the court's ruling on the cross-complaint. Because Defendants at best have presented only the facts and inferences favorable to their position, their insufficiency of the evidence argument is properly deemed waived. (*Ibid.*)

5. PNG Is the Prevailing Party on the Cross-Claims Related to the Deed of Trust

The deed of trust contains an attorney fee provision requiring the Trustor, PNG, to "appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary [RG] or Trustee, and to pay all costs and expenses, including . . . attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear, and in any suit brought by Beneficiary to foreclose this Deed."

Civil Code section 1717 authorizes the award of prevailing party attorney fees to either party "[i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party." (Civ. Code, § 1717, subd. (a).) The statute's "primary purpose . . . is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions" by making "an otherwise unilateral right reciprocal." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610.) Subdivision (b) directs the trial court to "determine who is the party prevailing on the contract for

purposes of this section,” and defines the prevailing party as “the party who recovered a greater relief in the action on the contract.” (§ 1717, subd. (b)(1).) Prevailing party attorney fees are available under the statute even when the relief sought is “of a declaratory nature.” (*Milman v. Shukhat* (1994) 22 Cal.App.4th 538, 545.)

The trial court found PNG and Macareno were the prevailing parties on the cross-claims based upon the deed of trust. On appeal, RG contends this finding is contrary to the statutory definition of “prevailing party” because, even though PNG and Macareno were found not to be liable on the cross-complaint, they were still ordered to repay RG’s \$268,700 loan. RG’s contention has no merit.

RG sought relief on the cross-complaint obligating PNG to repay the loan at an annual interest rate of 6 percent commencing in April 2013, plus 50 percent of the net profits from the Sylmar Property’s resale, in order to extinguish the deed of trust. For its part, PNG did not dispute it was obligated to repay the loan. It challenged only the terms that RG demanded for repayment, as well as the propriety of RG’s attempt to foreclose on the deed of trust. In obtaining relief that effectively enjoined RG from foreclosing on the lien for a period of six months, while limiting the terms of repayment to the amount of the loan plus 6 percent interest, PNG clearly recovered “greater relief in the action on the contract” (§ 1717, subd. (b)(1)) than RG. The trial court properly determined PNG was entitled to prevailing party attorney fees under Civil Code section 1717.

DISPOSITION

The judgment is reversed on the fraud claim and affirmed in all other respects. PNG Investments, Inc. and Pauline Macareno are awarded their costs.

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EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.