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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GRACE AHN et al.,

Plaintiffs and Appellants,

v.

GEORGE YAO et al.,

Defendants and Appellants.

B223489

(Los Angeles County
Super. Ct. No. BC362109)

APPEAL from a judgment of the Superior Court of Los Angeles County.

J. Stephen Czulager, Judge. Affirmed in part; reversed in part and remanded to the trial court with directions.

Masserman & Ducey, Mitchell F. Ducey and Terri L. Masserman; Hollins Law, Kathleen Mary Kushi Carter, Tamara M. Heathcote, and Christine R. Arnold, for Defendants and Appellants.

Law Offices of Joseph M. Kar, Joseph M. Kar; Edward J. Horowitz; Law Offices of Christopher L. Campbell and Christopher L. Campbell for Plaintiffs and Appellants.

Fifteen tenants¹ who resided at 5135 Zelzah Avenue in Encino, California (the building) brought a complicated action against the owners of the building, George Yao (Yao) and 4528 Colbath LLC (collectively defendants) after defendants notified the tenants that the building units were going to be sold as condominium units. Following a lengthy, two-phase trial, judgment was entered in favor of plaintiffs. Defendants appealed the judgment, challenging the damage award on the claims for wrongful eviction and negligence, penalties award, injunction, and attorney fees and cost award. Plaintiffs cross-appealed, objecting to the trial court's orders (1) granting defendants' motion for partial nonsuit, and (2) denying them prejudgment interest.

We agree with defendants that the trial court committed reversible error in instructing the jury pursuant to Government Code section 66459. As the trial court found when it correctly granted defendants' motion for partial nonsuit, Government Code section 66459 does not apply. We further conclude that the trial court erred in awarding civil penalties against defendants pursuant to Civil Code section 1940.2 "by way of" Business and Professions Code section 11018.2. Finally, because the judgment is reversed, the award for attorney fees and costs is reversed as well.

The trial court's award of restitution (\$2,170) to Grace Ahn is affirmed. In all other respects, the matter is remanded for further proceedings, including a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

Documents Filed in Connection with the Building

1. Original owner gets approval of the condominium project

On May 15, 1980, the original owner of the building applied for approval of a tract map for building a 22-unit condominium. Final approval was given in 1984.

¹ The tenants include Grace Ahn, Susan Ahn, Zareh Kevork Bagmossian, the Estate of Eli Farkas, Marian Farkas, Pourandokit (Helen) Bibiyan, Faraydoon Kamjoo, Sima Simino, Sami Kamjoo, Khalil Sayani, Flora Shadan-Sayani, Natalie Sayani, Natasha Sayani, Aghahan Taban, and Maryam Taban (collectively plaintiffs). Most of the plaintiffs are elderly and disabled.

On February 28, 1985, a certificate of occupancy for a 22-unit apartment house² was issued.

On June 21, 1985, the Department of Real Estate of the State of California (DRE) issued a condominium final subdivision public report. That report was set to expire on June 20, 1990.

2. Property is sold to the Huangs

In 1987, the original owner sold the building to Peter Ming Shun Huang and Loretta Nakagawa Huang (the Huangs). On March 26, 1991, they obtained from the DRE a renewed/amended condominium final subdivision public report that was set to expire on March 25, 1996.

Because the building was developed as a 22-unit building but was improperly operating as a 23-unit building, on August 2, 2005, the Huangs obtained a certificate of occupancy to convert the 23rd unit into a residential unit.

3. Huangs sell the building to defendants

In 2005, the Huangs sold the building to defendants.

On May 31, 2006, defendants submitted to the DRE a public report amendment/renewal application. That application mistakenly indicated that the building contained 22 units. On October 10, 2006, defendants filed an amendment to the condominium plan, confirming that the building contained 23 units. Three days later, the DRE issued a final subdivision public report condominium conversion, indicating that the original final public report had been issued on June 21, 1985, and that the amended/renewed report was being issued on October 13, 2006, and would expire on October 12, 2011.

² The documents are inconsistent—sometimes referring to the building as an apartment building and sometimes referring to it as a condominium.

Tenants' Leases and Notifications of Proposed Sale of Units

In the meantime, plaintiffs signed leases and moved into various units in the building. In addition to leases, some or all of the plaintiffs executed documents acknowledging that the “premises described” in their leases were “condominium” units.

On June 30, 2006, defendants sent plaintiffs a letter indicating that beginning July 2006, their units were going to be sold as condominium units.

On October 26, 2006, plaintiffs' counsel posted an advertisement, indicating that he was preparing to file a class action against defendants and inviting interested persons to contact him either to participate in the proposed class action or to pursue an individual claim.

Plaintiffs' Lawsuit is Commenced

In November 2006, plaintiffs filed their original complaint. The third amended complaint, which is the operative pleading, is convoluted and confusing; it blends numerous claims into singular causes of action and repeatedly cites to the specific statutes that plaintiffs claim were violated. As is relevant to this appeal, the third amended complaint alleges the following against these defendants:

(1) *Declaratory relief*. In this cause of action, plaintiffs allege that an actual controversy exists between plaintiffs and defendants regarding the validity of the acknowledgements and whether the building is an “apartment house” or “condominium.” In support of their claims, plaintiffs rely upon Government Code sections 66427.1, 66452.8, and 66459; Los Angeles Municipal Code sections 12.95.2 and 47.06; and Civil Code sections 1632, 1953, and 1962.

(2) *Rescission*. In this cause of action, plaintiffs seek to void each acknowledgement. Again, they rely upon Civil Code sections 1632 and 1953.

(3) *Violation of Business and Professions Code section 17200*. Plaintiffs allege that defendants violated Civil Code sections 1632, 1927, 1941, 1941.1, 1954, and 1962,

Government Code sections 66427.1, 66452.8,³ and 66459, and Los Angeles Municipal Code sections 12.95.2 and 47.06, among others.

(4) *Violation of Statute and/or Ordinance.* In count I of this cause of action, plaintiffs allege that defendants violated Government Code sections 66427.1, 66452.8, and 66459; Civil Code sections 1632, 1953, and 1962; and Los Angeles Municipal Code sections 12.95.2 and 47.06. In count II, they allege that defendants violated Civil Code section 1940.2 by failing and/or refusing to comply with various provisions of the Government Code, Civil Code, and Los Angeles Municipal Code. In count III, plaintiffs allege that defendants violated section 12.95.2 of the Los Angeles Municipal Code. In count IV, plaintiffs allege that defendants violated section 47.06 of the Los Angeles Municipal Code and seek damages, including punitive damages for violation of various provisions of the Government Code, Civil Code, and Los Angeles Municipal Code. In count V, plaintiffs allege that defendants violated Civil Code section 1950.5.

(5) *Wrongful/Constructive/Retaliatory Eviction.* Plaintiffs allege wrongful/constructive/retaliatory eviction based upon the same statutes mentioned earlier.

(6) *Breach of the Implied Warranty of Habitability.*

(7) *Negligence.*

Trial

Trial was to occur in two phases. In phase I, the jury would decide the claims for wrongful/constructive eviction, negligence, and breach of the implied warranty of habitability. In phase II, the parties agreed that the trial court would decide (1) whether defendants violated Business and Professions Code section 17200 et seq., and (2) whether the building was governed by specified “condominium conversion laws,” namely Government Code sections 66427.1, 66459, and 66452; Business and Professions Code

³ In 2008, Government Code section 66452.8 was amended and renumbered 66452.17.

sections 11012 and 11018.2, and Los Angeles Municipal Code sections 12.03, 12.95.2, and 47.06.

1. *Motions in limine*

Prior to trial, the parties filed a host of motions in limine. In particular, defendants filed motions to exclude evidence relating to Los Angeles Municipal Code section 12.03 and Government Code section 66459. Despite an earlier ruling⁴ denying plaintiffs' motion for a preliminary injunction on the grounds that the provisions of the Los Angeles Municipal Code governing condominium conversions did not apply, the trial court denied these motions.

2. *Defendants' motion for nonsuit*

On December 2, 2009, after plaintiffs rested, defendants moved for a nonsuit arguing, in part, that Government Code section 66459 did not apply. The trial court granted defendants' motion in part, finding that the building was not a residential conversion project.

3. *Jury instructions*

Following the presentation of evidence, the trial court charged the jury. As is relevant to the issues raised in this appeal, the trial court gave the jury instruction No. 3300-6, which instructed the jury regarding Government Code section 66459. Notably, the instruction only mentioned subdivisions (a), (c), and (d) of that statute. The trial court also gave instruction No. 16, a redacted instruction regarding Civil Code section 1950.5.⁵

⁴ This ruling was rendered by the Honorable Ernest M. Hiroshige. The pretrial motions were heard by the trial judge, the Honorable J. Stephen Czuleger.

⁵ Civil Code section 1950.5 “applies to security for a rental agreement for residential property that is used as the dwelling for the tenant.” (Civ. Code, § 1950.5, subd. (a).) Subdivision (h) dictates what the landlord is supposed to do with the security following termination of the landlord’s interest in the premises. (Civ. Code, § 1950.5, subd. (h).) No reference to that subdivision is contained in jury instruction No. 16.

4. *Jury verdict*

The jury found defendants liable for negligence⁶ and constructive eviction and awarded plaintiffs different amounts of damages, totaling \$136,400. That said, the damages for each plaintiff or grouping of plaintiffs was not segregated; in other words, if a plaintiff prevailed on both causes of action, the jury rendered one damage award. The jury found that defendants did not breach the implied warranty of habitability.

5. *Phase II*

Following phase II of the trial, the trial court determined the condominium conversion provisions of the Map Act and Government Code section 66459 did not apply. However, it awarded \$66,000 in civil penalties pursuant to Civil Code section 1940.2 “by way of” Business and Professions Code section 11018.2. The trial court also found that defendants violated Business and Professions Code section 17200 and awarded Grace Ahn \$2,170 in statutory damages (\$1,085 doubled pursuant to Civ. Code, § 1950.5, subd. (l)) and issued a permanent injunction ordering defendants to comply with Civil Code section 1940.2 and Business and Professions Code section 11018.2.

Attorney Fees and Costs

Later, the trial court determined that plaintiffs were the prevailing parties and awarded them attorney fees in the amount of \$803,573.75 (including a multiplier of 1.25) and costs in the amount of \$62,246.89.

Appeal and Cross-appeal

Defendants timely appealed, and plaintiffs timely filed a notice of cross-appeal.

⁶ Specifically, the jury was asked “Were DEFENDANTS negligent?” The jury answered in the affirmative. Because the issue was not raised on appeal, we express no opinion on the question of whether the jury was improperly asked to draw a legal conclusion.

DISCUSSION

I. Judgment in favor of plaintiffs on wrongful eviction and negligence causes of action must be reversed

As set forth above, the jury awarded damages to each plaintiff in connection with the wrongful eviction and negligence causes of action. Defendants contend that these awards in favor of plaintiffs must be reversed because the trial court improperly instructed the jury pursuant to Government Code section 66459. We agree that the trial court committed prejudicial error in charging the jury pursuant to Government Code section 66459.⁷ Thus, the judgment on these causes of action must be reversed and the matter remanded for a new trial, with proper jury instructions.

A. Government Code section 66459 does not apply

The parties agree that Government Code section 66459 only applies to properties to be converted from apartment houses to condominiums. Thus, in order to determine if the trial court committed prejudicial error in instructing the jury in accordance with that statute, we must determine whether the subject building was a condominium conversion. Neither the Subdivision Map Act (Gov. Code, § 66410 et seq.) or the Subdivided Lands Act (Bus. & Prof. Code, § 11000 et seq.) defines what qualifies as a conversion project. For that answer, pursuant to Government Code sections 66411 and 66412.3, we turn to the Los Angeles Municipal Code.

Los Angeles Municipal Code section 12.03 defines a residential conversion project as “[a]n existing apartment house, apartment hotel, hotel, multiple dwelling or group dwelling used exclusively for residential purposes proposed for conversion to a condominium, stock cooperative, or community apartment project to be used exclusively for residential purposes through approval of a tract or parcel map. For purposes of this definition, the term ‘existing’ means that the building was constructed prior to 1945 or, if

⁷ Because we conclude that Government Code section 66459 does not apply to this action, we do not reach the merits of defendants’ claim that even if Government Code section 66459 applied, the trial court erred in instructing the jury with only portions of that statute.

it was built after 1945, a certificate of occupancy has been issued for the building prior to the time of map application.”

Here, the subject building was built after 1945. And, the certificate of occupancy for the building was issued in 1985 after the time of the map application and approval. It follows that the subject building was not an “existing” building under the Los Angeles Municipal Code and therefore not a condominium conversion. Government Code section 66459, therefore, does not apply.⁸

B. The trial court committed reversible error in instructing the jury on Government Code section 66459

Having determined that the building was not a condominium conversion, we next consider whether the trial court committed prejudicial error in instructing the jury on Government Code section 66459 when that statute did not apply.⁹

“[T]here is no rule of automatic reversal or ‘inherent’ prejudice applicable to any category of civil instruction error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case ‘unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.’ [Citation.]” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.)

“When deciding whether an instructional error was prejudicial, ‘we must examine the evidence, the arguments, and other factors to determine whether it is reasonably probable that instructions allowing application of an erroneous theory actually misled the

⁸ Necessarily, we reject plaintiffs’ claims in their cross-appeal (1) that the trial court erred in granting defendants’ motion for nonsuit, and (2) that the trial court should have awarded remedies afforded by Government Code section 66459.

⁹ In their reply brief, defendants argue that the trial court erred by giving the jury a negligence per se instruction and instructing the jury in accordance with Business and Professions Code section 11018.2 and Civil Code section 1940.2, in addition to the erroneous instruction on Government Code section 66459. It is well-established that we do not consider arguments first raised in a reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

jury.’ [Citation.] A ‘reasonable probability’ in this context ‘does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.’ [Citation.]” (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 682, italics omitted.)

We conclude that the error was prejudicial.¹⁰ During his opening statement, plaintiffs’ counsel discussed condominium conversion laws, telling the jury that the judge would instruct on the “basic law on condominium conversion.” Plaintiffs’ counsel also directed the jury’s attention to the 90-day notice requirement contained in Government Code section 66459, subdivision (c), and informed the jurors that defendants did not give the requisite amount of notice. In short, plaintiffs’ counsel framed the case, in part, as one about an improper conversion.

Later, during trial, plaintiffs pressed the issue. For example, plaintiffs’ counsel questioned Yao on whether the subject building was a “conversion.” Particularly inflammatory are the questions regarding whether Yao gave the tenants 90 days notice. After all, if 90 days notice is only required if Government Code section 66459 applies, and that statute is inapplicable to the facts of this case, then there was no reason for the jury to hear that Yao did not provide such notice.

Plaintiffs’ testimony added to the error and confusion. For example, Grace Ahn testified that she was never given a 90-day notice of intention to sell or intention to convert. Similarly, Sami Kamjoo was allowed to testify on notices of intent to convert based upon his internet search and his interpretation as to when the 90-day notice period began to run.

¹⁰ Although not relevant to the analysis of whether instructional error occurred, we note that the trial court’s oscillating decisions on this issue may have led to the confusion at trial. Prior to trial, the trial court denied defendants’ motions in limine to preclude evidence of a “conversion.” Then, after trial, the trial court determined that this was not a residential conversion project and therefore granted defendants’ motion for nonsuit. In spite of that ruling, the trial court then instructed the jury pursuant to Government Code section 66459.

Taken together, we conclude that a different judgment was reasonably probable. Accordingly, we reverse the judgment for plaintiffs and remand the matter for a new trial.¹¹

In urging us to affirm, plaintiffs focus on the public report issued by the DRE in 1985 and the two renewed/amended public reports issued after ownership of the building changed (original owner to the Huangs and then the Huangs to defendants). We will not be misguided by plaintiffs' misdirection. Public reports are relevant in terms of Business and Professions Code section 11018.2.¹² But, whether defendants obtained proper public reports has no bearing on whether the building was a condominium conversion.

Plaintiffs may be claiming that the negligence judgment is proper because defendants were negligent by failing to comply with Business and Professions Code section 11018.2. We cannot agree for at least two reasons. *First*, as set forth above, the trial court's instruction on Government Code section 66459 infected the jury verdict, compelling a new trial without mention of this statute. *Second*, there is no legal authority to support plaintiffs' apparent claim that there is a private right of action for violation of Business and Professions Code section 11018.2. And, even if there were (perhaps through Bus. & Prof. Code, § 17200), plaintiffs do not have standing "because their

¹¹ Because we are reversing the judgment, we need not reach plaintiffs' claim that the trial court erred in refusing to award them prejudgment interest. We likewise express no opinion on defendants' claim that there was no evidence to support the jury's finding of constructive eviction. The jury awarded damages on the two causes of action on which those plaintiffs prevailed (wrongful eviction and negligence). There is no way for us to know how the jury apportioned their damage awards. (*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1158 ["To preserve for appeal a challenge to separate components of a plaintiff's damage award, a defendant must request a special verdict form that segregates the elements of damages"].) Defendants' failure to request a special verdict on segregated damages waives this issue on appeal.

¹² Business and Professions Code section 11018.2 provides, in relevant part: "No person shall sell or lease, or offer for sale or lease in this state any lots or parcels in a subdivision without first obtaining a public report from the Real Estate Commissioner."

claimed injury does not result from the alleged violation of” Business and Professions Code section 11018.2. (*Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1086.) Business and Professions Code section 11018.2 was designed to protect prospective purchasers (*Handeland v. Department of Real Estate* (1976) 58 Cal.App.3d 513, 517–518), and there is no evidence that plaintiffs were interested in purchasing their residential units.

II. *Challenges to Phase II of Trial; Civil Penalties, Injunction, and Restitution*

In Phase II of the trial, the trial court found that defendants violated Civil Code section 1940.2, subdivision (a), “by way of” their violation of Business and Professions Code section 11018.2 and awarded civil penalties against defendants in the amount of \$66,000. Assuming, without deciding, that defendants violated Business and Professions Code section 11018.2, we agree with defendants that a violation of that statute cannot constitute a violation of Civil Code section 1940.2.

Civil Code section 1940.2 provides, in relevant part: “(a) It is unlawful for a landlord to do any of the following for the purpose of influencing a tenant to vacate a dwelling: [¶] (1) Engage in conduct that violates subdivision (a) of Section 484 of the Penal Code. [¶] (2) Engage in conduct that violates Section 518 of the Penal Code. [¶] (3) Use, or threaten to use, force, willful threats, or menacing conduct constituting a course of conduct that interferes with the tenant’s quiet enjoyment of the premises in violation of Section 1927 that would create an apprehension of harm in a reasonable person. . . . [¶] (4) Commit a significant and intentional violation of Section 1954.” The statute does not mention Business and Professions Code section 11018.2. (See, e.g., *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1245, italics added [“Legislation enacted in 2003 that prohibits a landlord from engaging in *specified conduct* in order to encourage a tenant to vacate a dwelling includes a similar savings clause”].) And we were not directed to, and could not locate, any legal authority to support the proposition that a violation of Business and Professions Code section 11018.2 gives rise to a claim for penalties under Civil Code section 1940.2. Accordingly,

we conclude that the trial court erred in awarding penalties pursuant to Civil Code section 1940.2 by way of Business and Professions Code section 11018.2.

Plaintiffs assert that the judgment is proper because their claim under Civil Code section 1940.2 is based upon more than a violation of Business and Professions Code section 11018.2. The problem for plaintiffs is that that is not what the trial court found. The trial court's finding is based specifically upon Business and Professions Code section 11018.2. Because that finding is erroneous as a matter of law, the judgment must be reversed and remanded for a new trial, based upon alleged violations within the parameters enumerated in Civil Code section 1940.2.

It follows that we reverse the trial court's order granting injunctive relief. If, upon remand, the trial court determines that an injunction is appropriate, at that time it may determine whether to issue an injunction.

Finally, defendants urge us to reverse the trial court's restitution award to Grace Ahn of \$2,170. In support, they cite evidence from their witnesses that they did in fact return the security deposit to her and ask us to read into the jury's award of \$10,000 to her. Boiled down, defendants' argument is essentially a challenge to the evidence. It is well-established that we do not reweigh the credibility of witnesses. (*Eidsmore v. RBB, Inc.* (1994) 25 Cal.App.4th 189, 195.) In light of Grace Ahn's testimony that she never got her security deposit back, this portion of the judgment is affirmed.¹³

If defendants are claiming that this issue was actually given to the jury and that the trial court erred in reaching it at all, we deem this contention abandoned as inadequately briefed. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1186, fn. 3.) No legal authority is cited whatsoever in this portion of defendants' opening brief.

¹³ In the reply brief, defendants argue that they were denied their right to a jury trial on this issue. The problem with this argument is two-fold. First, as set forth above, we do not consider arguments first raised in a reply brief. (*Reichardt v. Hoffman, supra*, 52 Cal.App.4th at p. 764.) Second, the issue is not adequately supported by legal authority. (Cal. Rules of Court, rule 8.204(a)(1)(B).)

III. *Attorney fees and costs are reversed*

In light of our conclusion that the matter must be reversed and remanded for a new trial, it necessarily follows that the trial court's award of attorney fees and costs must be reversed as well. (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1053; *Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402.)

DISPOSITION

The restitution award in favor of Grace Ahn (\$2,170) is affirmed. In all other respects, the judgment is reversed and remanded for a new trial. Defendants are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD