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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LILLIAN H. JONES, Plaintiff and Respondent, v. MARCUS J. POLK, Defendant and Appellant.	B232906 (Los Angeles County Super. Ct. No. GC041763)

APPEAL from a judgment of the Superior Court of Los Angeles County, C. Edward Simpson, Judge. Affirmed with directions.

Law Firm of David Dunlap Jones, David D. Jones; Law Offices of Jeffrey A. Coleman and Jeffrey A. Coleman for Defendant and Appellant.

Counts Law Firm, Jeffrey J. Williams and Emahn Counts for Plaintiff and Respondent.

Marcus J. Polk appeals a judgment quieting title to real property in favor of Lillian H. Jones, canceling his note and deed of trust, and enjoining his attempted foreclosure sale. The trial court entered the judgment on equitable counts after the jury found that Polk had committed fraud in connection with Jones's execution of the note and deed of trust. Polk contends the evidence does not support the jury verdict. We conclude that Polk has shown no error in the judgment and therefore will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Factual Background*

Jones is a retired college teacher with a Bachelor of Arts degree in sociology and a Master of Arts degree in history. She has never worked in the real estate industry. Jones first met Celia Gallardo when Gallardo was 13 years old and was a friend of Jones's daughter. Gallardo was a frequent visitor in Jones's home and resided with Jones for three and one-half years during a time that Gallardo was experiencing difficulties with her parents. Gallardo later became a real estate agent. Gallardo helped Jones to purchase investment properties and managed properties on her behalf.

Jones resides in Altadena in a house that she purchased in April 2005. She purchased an investment property located on Sand Canyon Road in Canyon Country in July 2007. She understood that Gallardo would arrange for a loan to finance improvements and agreed that Gallardo would handle the money and oversee the construction. Jones executed a $1 million deed of trust against the Sand Canyon Road

property in August 2007 and executed a $2.1 million deed of trust against the property September 2007.

Gallardo telephoned Jones in January 2008, approximately one week after Jones was released from the hospital where she underwent heart surgery. Gallardo stated that Jones needed to sign some documents so they could complete the Sand Canyon Road house. Gallardo suggested that they go out to dinner afterwards. Gallardo presented several documents for Jones to sign on February 1, 2008, and they went to a notary public together. The documents stated the legal description of the property, but not the street address. Jones did not read the documents before signing them.

Jones believed at the time that the documents related to a construction loan for the Sand Canyon Road house. In fact, the documents she signed were a $390,000 promissory note and a deed of trust against her Altadena home. The note and deed of trust were in favor of Polk as beneficiary. Jones had never met, seen or communicated with Polk in any way and knew nothing about him. Jones never received any money pursuant to the promissory note. Instead, $390,000 was transferred from one account to another as part of a transaction that Jones apparently knew nothing about and in which she received no consideration.

That transaction involved a $390,000 loan from Polk to Gallardo's sister-in-law, Sung-Hee Linda Zagha, for Zagha's purchase of real property in Newhall. Polk borrowed $390,000 from El Camino Partners LLC in order to lend it to Zagha. The escrow company handling the purchase escrow, Executive Escrow, prepared three separate $390,000 promissory notes and three separate deeds of trust for three

individuals relating to the same $390,000 loan from Polk to Zagha. The purported borrowers from Polk were Jones, Zagha and Jean Littleton. The $390,000 loan proceeds were deposited in escrow, and Executive Escrow disbursed the funds to the Newhall property seller or for the benefit of the seller. Neither Jones nor Littleton was a party to the purchase escrow, and neither one authorized the disbursement of the loan proceeds. The purchase of the Newhall property was never completed.

Peppertree Financial, Inc. (Peppertree), as agent of the trustee under the deed of trust, recorded a notice of default and election to sell against the Altadena property in June 2008.

2. *Trial Court Proceedings*

Jones filed a complaint against Gallardo, Polk and Peppertree in October 2008. She alleged that the defendants had misrepresented and concealed the facts relating to the $390,000 promissory note and deed of trust. A default was entered against Gallardo in June 2010, and the trial court entered a default judgment against her on July 27, 2010, awarding Jones $390,000 in damages and $6,210 in attorney fees and costs.

Jones filed an amended complaint against Gallardo, Polk and Peppertree in December 2010, alleging counts for (1) fraud, against Gallardo and Polk; (2) breach of contract, against Polk; (3) cancellation of the $390,000 promissory note and deed of trust, against Polk; (4) quiet title, against Polk; and (5) an injunction against any foreclosure, against Polk and Peppertree. Polk filed a cross-complaint against Jones in December 2010, alleging a single count for breach of the promissory note.

A jury trial took place in February 2011 on Jones's counts for fraud and breach of contract. Polk voluntarily dismissed his cross-complaint without prejudice during the trial. The trial court granted Polk's motion for nonsuit against the count for breach of contract. The jury returned a special verdict finding in favor of Jones and against Polk on theories of intentional and negligent misrepresentation, constructive fraud, intentional concealment and false promise. The jury found that Jones had suffered $390,000 in damages plus reasonable attorney fees.

The trial court then considered the equitable counts. The court stated that in light of the jury's findings and in the exercise of the equitable powers of the court, it would declare the promissory note and deed of trust void and cancel and rescind them.[1] The court stated that it therefore would not award damages against Polk. No party requested and the court did not issue a statement of decision.

The court entered a judgment on March 4, 2011, stating that the $390,000 promissory note and deed of trust are canceled, rescinded and void; that title to the Altadena property is quieted in Jones; and that Polk and Peppertree are permanently enjoined from foreclosing on the property. The trial court denied Polk's motion for judgment notwithstanding the verdict or for a new trial. Polk timely appealed the judgment.

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[1] The trial court stated: "The court, in light of the findings of the jury and in the exercise of the equitable powers of the court, the court will declare that the promissory note and deed of trust are void and are to be cancelled and rescinded, if not voidable."

CONTENTIONS

Polk contends there is no evidence that he made any representation, or any communication, to Jones, directly or indirectly, so there could be no intentional or negligent misrepresentation and no false promise; (2) the evidence cannot support his liability for fraudulent concealment; (3) there is no evidence that Gallardo acted as his agent or that he ratified any act by Gallardo and therefore no basis for his liability for any fraud; and (4) there is no evidence that he had a confidential or fiduciary relationship with Jones as necessary to support liability for constructive fraud.

DISCUSSION

1. *We Must Infer Factual Findings in Support of the Judgment*

A trial court may conduct a jury trial on legal issues and a nonjury trial on equitable issues arising in the same action. (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156-157.) The preferred practice ordinarily is to try the equitable issues first if the decision on those issues may obviate the need for a jury trial. (*Id.* at p. 157; *Nwosu v Uba* (2004) 122 Cal.App.4th 1229, 1238, 1242.) If the legal issues are decided first, however, the jury's factual findings are binding on the trial court deciding the equitable issues to the extent that the equitable issues are based on the same facts. (*Hughes v. Dunlap* (1891) 91 Cal. 385, 388-390; *Hoopes*, *supra*, at pp. 158-161.) If the equitable issues present questions of fact not decided by the jury, the trial court decides those factual questions as the trier of fact. (*Hoopes*, *supra*, at pp. 161-163.)

A court that tries a question of fact must issue a statement of decision explaining the factual and legal bases for its decision as to the principal controverted issues at trial,

but only if timely requested by a party appearing at trial. (Code Civ. Proc., § 632.) The request must specify the issues as to which the party is requesting a statement of decision. (*Ibid.*) After a party has requested a statement of decision, any party may make proposals as to the content of the statement of decision. (*Ibid.*) If a nonjury trial on equitable issues conducted after a jury trial involves questions of fact that were not conclusively decided by the jury, the nonjury trial involves the trial of a question of fact by the court within the meaning of Code of Civil Procedure section 632, so a statement of decision is required upon timely request.

A statement of decision explains the bases for the trial court's decision. Absent a statement of decision, the reviewing court must presume that the trial court resolved all factual disputes in favor of the prevailing party as necessary to support the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267; see Code of Civ. Proc., §§ 632, 634.) A statement of decision may reveal that the trial court made factual findings in favor of the prevailing party on some contested issues but not others, thus depriving the prevailing party of the benefit of inferred findings in its favor on those other issues. A reviewing court must not infer findings in favor of the prevailing party on any issues that the statement of decision does not resolve or on which the statement of decision is ambiguous, if the omission or ambiguity was brought to the trial court's attention either before the entry of judgment or on a motion for a new trial or to vacate the judgment. (Code of Civ. Proc., § 634.)

The trial court entered a judgment in favor of Jones on the equitable counts decided by the court and awarded her no relief on the legal counts decided by the jury. To the extent that the equitable issues presented questions of fact not decided by the jury, we must infer factual findings in support of the judgment absent a statement of decision.

Polk argues that the trial court's statement at the conclusion of trial (quoted in fn. 1, *ante*) shows that the court relied exclusively on the factual findings by the jury and made no factual findings of its own. We disagree. An oral or written statement by the court explaining its intended decision at the conclusion of a nonjury trial is a tentative decision and is nonbinding. (*Shaw v. County of Santa Cruz*, *supra*, 170 Cal.App.4th at pp. 268-269; *County of Orange v. Barratt American, Inc.* (2007) 150 Cal.App.4th 420, 438-439.) California Rules of Court, rule 3.1590(a) states:

"On the trial of a question of fact by the court, the court must announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk. Unless the announcement is made in open court in the presence of all parties that appeared at the trial, the clerk must immediately serve on all parties that appeared at the trial a copy of the minute entry or written tentative decision."

California Rules of Court, rule 3.1590(b) states:

"The tentative decision does not constitute a judgment and is not binding on the court. If the court subsequently modifies or changes its announced tentative decision,

the clerk must serve a copy of the modification or change on all parties that appeared at the trial."[2]

The provisions of the California Rules of Court have the force of statutes to the extent that they are not inconsistent with legislative enactments or constitutional law. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 125.) We conclude that the trial court's oral statement at the conclusion of trial was a nonbinding tentative decision pursuant to California Rules of Court, rule 3.1590 rather than a binding tentative decision. There is no need to interpret the tentative decision because regardless of our interpretation of the tentative decision, it was nonbinding and does not preclude inferred findings in support of the judgment.

2. *Substantial Evidence Supports the Implied Finding that the Promissory Note and Deed of Trust Are Void for Lack of Consideration*

A court may cancel a written instrument that is void or voidable if there is a reasonable apprehension that it may cause serious injury to the plaintiff. (Civ. Code, § 3412.)[3] An action to cancel a written instrument is an equitable action. (*Ballou v.*

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[2] California Rules of Court, rule 3.1590(c) provides that the court in its tentative decision may state that the tentative decision is the court's proposed statement of decision, subject to any party's objection, or that the tentative decision will become the statement of decision unless a party timely specifies additional controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision. The trial court did not do so here.

[3] "A written instrument, in respect to which there is reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." (Civ. Code, § 3412.)

Avery (1917) 175 Cal. 641, 642-643; *Hironymous v. Hiatt* (1921) 52 Cal.App. 727, 731.)

The absence of consideration for a promissory note or a deed of trust is grounds for cancellation. (*Hunter v. Hunter* (1942) 21 Cal.2d 228, 231-232; *Hironymous v. Hiatt*, *supra*, 52 Cal.App. at p. 731.) Whether a note or a deed of trust was given for consideration is a question of fact. (*Hunter*, *supra*, at pp. 231-232; *Hironymous*, *supra*, at pp. 733-734.) We review the sufficiency of the evidence to support a factual finding under the substantial evidence standard. (*Mealy v. B-Mobile, Inc.* (2011) 195 Cal.App.4th 1218, 1222.)

Substantial evidence is evidence that a rational trier of fact could find to be reasonable, credible and of solid value. We view the evidence in the light most favorable to the judgment and accept as true all evidence tending to support the judgment, including all facts that reasonably can be deduced from the evidence. We must affirm the judgment if an examination of the entire record viewed in this light discloses substantial evidence to support the judgment. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; *Mealy v. B-Mobile, Inc.*, *supra*, 195 Cal.App.4th at p. 1223.)

Polk does not contend the evidence is insufficient to support the implied factual finding that Jones received no consideration for the promissory note and deed of trust. Instead, he argues that the oral statement by the trial court at the conclusion of trial shows that the court made no such finding. We have already rejected that argument. We must presume that the evidence supports the trial court's factual findings unless the

appellant affirmatively demonstrates to the contrary. (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 879.) By failing to cite and discuss the evidence on point, Polk abandons any claim of error as to the sufficiency of the evidence to support the judgment. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 677.)

We conclude that Polk has shown no error in the judgment canceling the promissory note and deed of trust based on the absence of consideration, quieting title in favor of Jones and enjoining Polk and Peppertree from foreclosing on the property. In light of our conclusion, we need not decide whether the evidence supports the jury verdict on the various fraud theories.

3. *The Default Judgment Must Be Modified*

The default judgment against Gallardo awards Jones $390,000 in damages arising from the deed of trust and $6,210 in attorney fees and costs. The trial court's cancellation of the deed of trust, which we affirm, completely eliminates the $390,000 in damages arising from the deed of trust. Jones does not dispute this and does not object to a reduction of the default judgment in that amount. Accordingly, the trial court will be directed to modify the default judgment filed on July 27, 2010, by striking the award of $390,000 in damages.

DISPOSITION

The judgment is affirmed with directions to modify the default judgment against Gallardo filed on July 27, 2010, as reflected herein. Jones is entitled to recover her costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.