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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WILLIAM HUANG et al.,

Plaintiffs and Respondents,

v.

KUO FENG KO,

Defendant and Appellant.

B228092

(Los Angeles County
Super. Ct. No. KC057253)

APPEAL from a judgment of the Superior Court of Los Angeles County. Peter Joseph Meeka, Judge. Affirmed.

Kuo Feng Ko, in pro. per., for Defendant and Appellant.

Law Offices of Edward C. Ip & Associates and Bhupinder K. Malik for Plaintiffs and Respondents.

Kuo Feng Ko appeals from a judgment entered in favor of William Lien-Shie Huang, Shiang Lan Huang, Jane S. Huang, and May Huang (collectively referred to as the Huangs) on their action for breach of contract and common counts in connection with a residential purchase agreement entered into between the Huangs and Ko for property located in Walnut, California. The trial court ordered Good News Escrow Company to release Huang's escrow deposit of \$26,640 to the Huangs and ordered Ko to pay prejudgment interest on the escrow deposit in the amount of \$4,771 and costs in the amount of \$2,571.90. The court also awarded attorney fees to the Huangs in the amount of \$34,069.33. Ko contends that there was insufficient evidence to support the judgment. We disagree because the evidence established that Ko breached the residential purchase agreement by his failure to deliver marketable title to the Walnut property on the date escrow was to close. Ko also contends that the evidence does not support the award of attorney fees. But Ko failed to file a notice of appeal from the court's order awarding attorney fees. Accordingly, we affirm the judgment.

BACKGROUND

On December 23, 2008, in another case, Ko was awarded a judgment after a court trial against Hou You Liang and F & T Group, Limited Liability Company Escrow (Liang) with respect to the Walnut property, whereby Liang was ordered to sell the Walnut property to Ko for a certain price with escrow to close 90 days after the judgment became final. Ko filed a notice of appeal from the judgment. The Ko-Liang escrow on the Walnut property did not close as pertinent to the instant case.

Meanwhile, in July 2009, Shiang Lan contacted Ko after seeing his advertisement for the sale of the Walnut property. Ko told Shiang Lan and her husband William that he was the owner and showed them the house by pulling open the garage door and opening the front door from the inside. William and Shiang Lan and their daughters Jane and May agreed to purchase the Walnut property for \$888,000 and signed a document entitled, "California residential purchase agreement and joint escrow instructions," dated July 27, 2009, with escrow to close on September 14, 2009 (the purchase agreement). The purchase agreement contained a provision stating that "[t]ime is of the essence."

On August 5, 2009, Shiang Lan received documents from the escrow company, including a preliminary title report, that indicated the Walnut property was in a “double escrow” and that there was a lawsuit pending against Ko. Ko assured Shiang Lan that the double escrow would not be a problem. The Huangs made two deposits to the escrow company as required by the purchase agreement, totaling \$26,640.

On August 6, 2009, Shiang Lan spoke by telephone to Liang, whose fax number was on a “No Trespassing” sign that Shiang Lan had noticed on the Walnut property. Liang informed the Huangs that the Walnut property belonged to his company, which had a lawsuit pending against Ko.

Escrow did not close on the Walnut property on September 14, 2009, because Ko failed to convey title to the Huangs. On September 15, 2009, the Huangs faxed a letter to the escrow company, explaining that Ko had not conveyed title to them and requesting the return of their deposit. The deposit was not returned to the Huangs.

On November 12, 2009, the Huangs filed a complaint for breach of contract and common counts against Ko. On September 28, 2010, after a two-day court trial, the trial court found in favor of the Huangs on the breach of contract and common counts causes of action in the amount of \$26,640. On October 26, 2010, the court entered judgment ordering the escrow company to release the escrow deposit of \$26,640 to the Huangs and Ko to pay prejudgment interest on the escrow deposit in the amount of \$4,771 and costs in the amount of \$2,571.90. On December 16, 2010, the court awarded attorney fees to the Huangs in the amount of \$34,069.33.

On October 12, 2010, Ko filed a notice of appeal from the order of “September 28, 2010 ordered, adjudged and decreed.”

DISCUSSION

A. Appealability

The Huangs first contend that Ko’s appeal must be dismissed because it was filed prematurely. California Rules of Court, rule 8.104(a), requires that a notice of appeal must be filed on or before 60 days after the party filing the notice of appeal is served with notice of entry of judgment. The Huangs urge that therefore Ko’s notice of appeal was

premature because it was filed on October 12, 2010, prior to the entry of judgment on October 26, 2010. But because Ko's notice of appeal was intended to be an appeal from the final judgment based on the September 28, 2009 ruling by the trial court, and both parties have briefed the appeal, we shall treat the notice of appeal filed on October 12, 2010 as timely filed after the entry of judgment on October 26, 2010. (*Lee Newman, M.D., Inc. v. Wells Fargo Bank* (2001) 87 Cal.App.4th 73, 78.) On the other hand, Ko's failure to file an appeal with respect to the order awarding attorney fees is fatal to his claim on appeal that the court erred in awarding attorney fees. (*Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284, rejected on other grounds in *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315 [appellate court has no jurisdiction to review an award of attorney fees made after entry of the judgment, unless the order is separately appealed].) Accordingly, he cannot challenge the attorney fees award.

B. Substantial evidence supports the judgment

Ko contends that there was insufficient evidence to support the trial court's judgment. We disagree because Ko failed to convey marketable title to the Walnut property to the Huangs on the date escrow was to close and therefore breached the residential purchase agreement.

"In a contract for the sale of real estate the delivery of the deed and the payment of the purchase price are dependent and concurrent conditions. [Citations.] Neither party to such a contract can place the other in default unless he is able to perform or tender performance. [Citations.] . . . '[A] vendor, who, at the time of contracting to sell land, has not perfected his title to it, cannot claim a forfeit deposited by the purchaser to secure performance on his part on the latter's repudiation of the contract before the time for performance arrives, unless he shows that he has perfected his title so as to be in a position to perform his own agreement.'" (*Brant v. Bigler* (1949) 92 Cal.App.2d 730, 733–734.) "[T]he vendor must be able to make good title at the time fixed by his contract." (*Ellwood v. Niedermeyer* (1936) 12 Cal.App.2d 699, 704, 705–706 [defendant "contracted at his peril for the delivery of title to property he did not own" and breached

contract for purchase of real estate when he was unable to convey marketable title to plaintiff].)

Ko argues that because the Huangs knew that the purchase agreement was “illegal” in that they were aware of the double escrow and pending litigation, they are not entitled to the return of their deposit. We disagree. The Huangs and Ko entered into the real estate purchase agreement dated July 27, 2009, with an escrow closing date of September 14, 2009 and a provision that time was of the essence. Ko breached the agreement by failing to deliver marketable title by September 14, 2009. Thus, the evidence supported the trial court’s judgment ordering the escrow company to release the escrow deposit of \$26,640 to the Huangs and Ko to pay prejudgment interest on the escrow deposit in the amount of \$4,771 and costs in the amount of \$2,571.90. We also conclude that the evidence supported the court’s judgment in favor of the Huangs on the cause of action for common counts. (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [claim for money had and received can be based on an express contract].)

DISPOSITION

The judgment is affirmed. William Lien-Shie Huang, Shiang Lan Huang, Jane S. Huang, and May Huang are entitled to costs on appeal.

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MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.