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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MAGNUM PROPERTIES, INC.,	B261417
Plaintiff and Appellant,	(Los Angeles County
v.	Super. Ct. No. BC483226)
GEORGE M. PRINCE et al.,	
Defendants and Respondents.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles F. Palmer, Judge. Affirmed.

Michael Alan Abramson for Plaintiff and Appellant  
Magnum Properties, Inc.

Richard L. Riemer II for AIR Commercial Real Estate  
Association as Amicus Curiae on behalf of Plaintiff and Appellant  
Magnum Properties, Inc.

Law Office of Harry S. Carmack and Harry S. Carmack for  
Defendants and Respondents George M. Prince and Prince  
Commercial Real Estate Services, Inc.

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After escrow closed on the purchase and sale of a multi-million dollar shopping center in Santa Fe Springs, the buyer's real estate broker, Magnum Properties, Inc., sued the seller's real estate broker, George M. Prince, for fraud, alleging Prince had falsely represented that the seller would not be paying a broker's commission in connection with the transaction. In fact, Magnum alleged, the seller had agreed to pay, and did pay, Prince a significant commission and Prince unlawfully concealed it from Magnum. Following a bench trial, the court ruled in favor of Prince. On appeal Magnum contends the trial court focused exclusively on the alleged misrepresentations and failed to consider evidence at trial that conclusively established Prince's unlawful concealment. We affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

##### *1. Prince's Original Listing Agreement with the Seller*

In June 2008 Frederick Jack Hanshaw hired Prince, the president and sole shareholder of Prince Commercial Real Estate Services, Inc., to list for sale a two-story, 114,656 square foot shopping center Hanshaw owned located at 11442-11570 East Telegraph Road in Santa Fe Springs. The listing agreement, twice renewed, expired on April 15, 2009.

##### *2. Prince's January 2011 Commission Agreement with the Seller*

In December 2010 Rudy Caamano, President of CIM Financial, telephoned Hanshaw's office to inquire about purchasing the shopping center. At Hanshaw's request Prince telephoned Caamano, and the two men arranged to meet in person on January 12, 2011 to discuss a possible sale. Because Prince's listing agreement with Hanshaw had by this time expired, Prince entered into a new written commission agreement with Hanshaw prior to his January 12, 2011 meeting with Caamano that, among other things, identified Prince as Hanshaw's broker, authorized him to act on Hanshaw's behalf

and provided for a sales commission to Prince in the amount of 3 percent of the gross purchase price of the shopping center.

*3. The Conflicting Evidence Concerning Prince's Alleged Misrepresentation*

Caamano and Prince offered conflicting testimony at trial as to Prince's statements during their introductory telephone call and January 12, 2011 meeting. Caamano testified that Prince made clear in their first telephone call that he would be assisting Hanshaw in this transaction as a favor and would not be receiving a broker's commission. According to Caamano, Prince stated the property had originally been marketed for sale at a higher price; Hanshaw needed to net \$23 million in the transaction; and to accomplish this objective, Hanshaw would not agree to pay a commission to any broker in the transaction.

Prince, in contrast, testified he and Caamano had not discussed commissions at all during their introductory telephone call. Rather, Caamano had wanted details on the shopping center's operations, and Prince explained Caamano would need to sign a confidentiality agreement before Prince could provide him with any information. Caamano and Prince made an appointment to meet in person on January 12, 2011. At the January 12, 2011 meeting Caamano told Prince he was interested in making a purchase offer and routinely used Magnum as his broker for such purposes. Prince replied, "That is fine," but Caamano would be responsible for all of Magnum's fees, including any commission, because "it was not going to be coming out of my pocket." Caamano assured Prince that Magnum's commission would not be an issue for Prince. Caamano explained he would pay Magnum directly to assist him in writing the offer and Caamano, an experienced real estate investor, would handle other details of the transaction with Prince himself. Prince did not otherwise discuss his commission with Caamano. Caamano

also signed a confidentiality agreement that, among other things, provided Hanshaw would pay Prince's fees in this transaction.<sup>1</sup>

4. *Magnum's Negotiated Commission with Caamano*

Following the January 12, 2011 meeting with Prince, Caamano told Mike Meraz, the president of Magnum, that Hanshaw would not be paying a broker's commission. Caamano offered to pay Magnum \$25,000 to prepare a written purchase offer on his behalf. Meraz agreed and prepared the written offer for Caamano's firm, CIM Financial, to purchase the shopping center for \$23 million. Paragraph 27.2 of the offer confirmed, "Buyer agrees to pay Broker Magnum Properties a real estate Brokerage Fee in a sum equal to \$25,000." No other brokerage fee is mentioned in the offer; and Meraz crossed out the provisions in the printed form that otherwise provided for cooperating brokers to share in the sales commission.

Meraz submitted the purchase offer to Prince on January 14, 2011 together with an email stating, "Our firm is assisting the Buyer, Rudy Caamano, in this transaction—at no cost to you." At trial Meraz testified he used the words "at no cost to you" to highlight that Caamano was paying him directly in light of the absence of any commission in the transaction. He did not intend to suggest that Prince was not obligated to share his commission if he received one. Meraz also testified that Prince had also told him directly some time before he wrote the purchase offer that Hanshaw would not be paying any brokerage commission in the transaction. Prince denied making that statement.

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<sup>1</sup> The first paragraph of the confidentiality agreement provides, "All fees due Prince in connection with the sale of the property shall be paid by Owner [Hanshaw]." Prince's expert witness, a real estate broker, testified the term "fees" is understood in the industry to encompass a broker's commission.

## *5. The Purchase and Sale Agreement and Opening of Escrow*

After receiving the purchase offer, Prince submitted a counteroffer on Hanshaw's behalf that left many provisions of the original offer intact, including the \$23 million purchase price, but altered the financing terms. The counteroffer also identified Prince as the exclusive agent for the seller and Magnum as the exclusive agent for the buyer and affirmed that no other brokers were involved in the transaction. All other provisions in Magnum's original offer were incorporated in the counteroffer. CIM Financial accepted the counteroffer on January 21, 2011, and an escrow account was opened.

## *6. A Buyer/Seller Dispute During the Escrow Period*

While the property was in escrow, a dispute arose between Hanshaw and Caamano over the terms of the transaction. According to Prince, Caamano asked Prince several times during the extended escrow period to reduce his commission to lower the purchase price; Prince refused. Caamano denied ever making those requests.

In November 2011, nearly 11 months after escrow had opened, Hanshaw instructed Prince through his attorney to stop all involvement in the transaction. According to Prince, Caamano had attempted to make so many changes to the original deal since January 2011 that Hanshaw had soured on the transaction itself and on Prince, who he believed was ineffective in dealing with Caamano. Prince complied with Hanshaw's request.

## *7. The Closing of Escrow and Payment of a Commission to Prince*

On January 12, 2012 Hanshaw's attorney wrote an email authorizing the escrow officer, Dueworth Butler, to "proceed to the closing in accordance with the attached [j]oint [c]losing [e]scrow [i]nstructions." Hanshaw's attorney directed that Prince be paid his sales commission but made clear that Prince was

being paid “under protest” and “with a full reservation of rights.” Butler followed that instruction; escrow closed the same day; and Prince was paid \$690,000 in sales commission. Caamano and Meraz testified they did not learn about the fact of Prince’s commission until the day of, or just after, escrow closed.

8. *Magnum’s Lawsuit and Additional Evidence at Trial*

Magnum sued Prince for intentional and negligent misrepresentation and concealment, claiming Prince misrepresented to Magnum that Hanshaw was not paying a commission in this transaction. In fact, Magnum alleged, Hanshaw paid Prince a 3 percent commission and Prince unlawfully misrepresented and/or concealed that fact from Magnum. Had Magnum known of the commission, it would have insisted on sharing in that commission and would not have agreed to accept the far lesser sum of \$25,000 to represent Caamano.

The case was tried before the court in a bench trial. In addition to the testimony from Caamano and Meraz discussed above, Magnum presented two documents it claimed conclusively established Prince’s obligation to share his commission with Magnum and Prince’s unlawful concealment of that obligation. First, Magnum introduced a May 10, 2011 owner-agency listing agreement signed by Hanshaw and Prince, which included the following handwritten notation: “Broker, George Prince, shall pay commission to cooperating brokers from the proceeds of his commission. Owner shall not be expected to pay additional fees to cooperating brokers; Broker [Prince] shall not be compensated on lease renewals or any other negotiations with existing tenants; owner will consult with Broker on any lease renewals.” The back page of that agreement identifies a 3 percent broker’s commission to be paid on the sale of improved property. The agreement authorized Prince to list the property for sale at a new purchase price of \$25 million or for lease of \$1.50 to \$2.00 per square foot.

Magnum also introduced a January 10, 2012 letter from Prince's attorney to Butler attaching the May 10, 2011 listing agreement and demanding payment of Prince's commission. The demand letter stated, "It has come to [Prince]'s attention that the Seller, F.J. Hanshaw Properties, has failed as of this date, or has refused as of this date, to execute the Commission Instructions prepared by escrow for the payment of [Prince]'s brokerage services. It is further [Prince]'s understanding that escrow is scheduled to close January 13, 2012. [¶] Demand is hereby made that Commerce Escrow Company withhold and pay to [Prince] the sum of \$690,000.00 at closing from proceeds of the Seller. Enclosed please find an executed copy of the Standard Owner-Agency Agreement . . . ."

Magnum argued at trial the May 10, 2011 listing agreement, purportedly hidden from Magnum, conclusively demonstrated that, whatever Hanshaw's intent may have been in January 2011, by May 2011 he had clearly expected Prince to share his commission with Magnum and Prince had deliberately concealed that fact from Magnum. Magnum also argued that, by attaching the agreement to his demand for his commission, Prince acknowledged the May 2011 listing agreement governed this transaction.

Prince provided a very different explanation of the May 10, 2011 listing agreement and his January 2012 demand letter. According to Prince, by May 2011 Hanshaw had begun to question whether the sale to Caamano would actually be completed. With the potential collapse of the Caamano deal in mind, Hanshaw and Prince entered into a new, back-up listing agreement that required Prince to remarket the property for lease or for sale on different, and more favorable, terms to Hanshaw. In particular, the new listing agreement identified an increased purchase price of \$25 million and, alternatively, authorized a separate lease price. Prince explained he had submitted the May 2011 listing agreement with his January 10,

2012 demand letter to escrow in an abundance of caution. He had already submitted the commission agreement that governed the Caamano transaction. Having been frozen out of the details of the transaction months earlier, however, he was uncertain whether Caamano was still the purchasing party. In the event the sale to Caamano had fallen through and another purchaser was involved, Prince wanted to be sure he received a sales commission. The May 2011 listing agreement, he insisted, did not govern the transaction with Caamano.

John Pagliossotti, a licensed real estate broker in California specializing in commercial property transactions, testified as an expert witness for Magnum. According to Pagliossotti, brokers have an obligation under the rules of ethical conduct governing their profession to disclose all material facts of the transaction. This obligation would include disclosures by a seller's broker to the buyer's broker concerning the payment of a commission. Pagliossotti acknowledged that commissions are governed by agreement and, absent an agreement between the two brokers to share in the commission, there is no duty to share a commission. However, because Magnum, as the only other cooperating broker in the transaction, was "obviously" an intended third party beneficiary of the May 2011 listing agreement, Prince had a duty to disclose to Magnum the fact that Hanshaw was paying a commission.<sup>2</sup>

Carlos Joseph Lopez, a licensed real estate broker specializing in commercial transactions, testified as Prince's expert. Lopez opined it was not required, or even customary, for a seller's broker in a commercial property transaction to disclose

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<sup>2</sup> Near the close of evidence Magnum sought to amend his pleadings according to proof to resuscitate an earlier-abandoned breach of contract cause of action based on his theory that Magnum was a third party beneficiary of the May 10, 2011 listing agreement. The court denied the request, and Magnum does not challenge that ruling on appeal.



the fact of his commission to the buyer's broker. Lopez explained disclosure rules govern material facts affecting the value of the subject property and a commission agreement between the seller and the seller's agent does not affect the value of the property.

9. *The Trial Court's Proposed Statement of Decision and Magnum's Objections*

On June 19, 2014, after a full trial and posttrial briefing, the trial court issued a proposed statement of decision finding that Prince had fully disclosed his commission to Caamano in their first face-to-face meeting on January 12, 2011 and thus no misrepresentation or unlawful concealment had occurred. The court also found Prince had never misrepresented any facts about his commission to Magnum and Magnum had failed to meet its burden of proof to demonstrate unlawful concealment of a material fact.

On June 27, 2014 Magnum filed its proposals for principal controverted issues to be included in the statement of decision and requested a hearing. (Cal. Rules of Court, rule 3.1590(c), (k).) Magnum asked the court to address in its statement of decision the following contentions: (1) Prince's testimony that he signed the May 10, 2011 listing agreement and attached it to his demand letter to Butler on January 12, 2012 constituted a "judicial admission" of Prince's obligation to share his commission with Magnum; (2) the May 10, 2011 listing agreement governed this transaction; (3) to the extent Prince claimed at trial to have represented both the buyer and the seller in the transaction, he breached his duty to his client Caamano to disclose his sales commission.

In its final statement of decision the court found Prince credible and Meraz and Caamano not credible, no misrepresentation had occurred, and Magnum had failed to meet its burden of proving that Prince concealed or suppressed a

material fact with the intent to defraud Magnum.<sup>3</sup> The court also observed the confidentiality agreement, which Caamano and Meraz were given prior to making CIM Financial's purchase offer, disclosed to Meraz and to Caamano that Hanshaw was paying Prince's fees in this transaction. As for Magnum's arguments in its objections to the proposed statement of decision, the court stated, "In reaching the findings and determinations set forth above, the court has considered the contentions stated in [Magnum]'s proposals for principal controverted issues and either found them not supported by the evidence or, to the extent they are supported by the evidence, that they are outweighed by the conflicting evidence described above."

#### 10. *The Attorney Fee Award*

Prince moved for attorney fees based on an attorney fee provision in the purchase/sale agreement. After further briefing and a hearing, the court awarded Prince attorney fees in the amount of \$274,122.50.

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<sup>3</sup> The trial court explained its findings, "Prince's trial testimony was more direct and precise than Caamano's and the court found Prince's testimony and demeanor credible. As between Caamano and Prince, based on their respective testimony and their manner of testimony, including their respective demeanors, and the significant inconsistencies in Caamano's testimony at trial, at deposition, and in his declaration, the court finds Prince's testimony at trial to be significantly more credible than that of Caamano. Thus, to the extent the trial testimony of Caamano conflicts with that of Prince, the court finds Prince's testimony to be true and Caamano's to be not true." The court also found, "[a]s between Meraz and Prince, on the issue of whether Prince ever told Meraz the seller was not paying any commission on the Shopping Center transaction, the court finds Prince's testimony substantially more credible. . . ."

## CONTENTIONS

Magnum does not challenge the trial court's factual findings that Prince truthfully represented to Caamano in January 2011 that Hanshaw was paying him a sales commission and that such a disclosure was also made in the confidentiality agreement Caamano signed and Meraz reviewed prior to making the purchase offer. Rather, Magnum contends the trial court failed to consider whether (1) the May 2011 listing agreement altered the terms of the transaction and, in particular, made Magnum a third-party beneficiary of Prince's commission agreement with Hanshaw; and (2) Prince unlawfully concealed that fact from Caamano and Magnum. Had it considered that evidence, Magnum argues, the court would have found in favor of Magnum.<sup>4</sup>

## DISCUSSION

### 1. *Governing Law*

“The elements of a cause of action for fraud based on concealment are: “the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.”” (*Bank of America Corp. v. Superior Court* (2011) 198 Cal.App.4th 862, 870; accord, *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1126-1127.)

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<sup>4</sup> Magnum's notice of appeal identifies both the judgment in favor of Prince and the postjudgment order awarding attorney fees. Apart from challenging the judgment, which is the basis for the award of attorney fees, its appellate briefs do not include any argument specifically directed to the fee award.

There are four circumstances in which nondisclosure or concealment constitutes actionable fraud: “(1) [W]hen the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant has exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts.”” (*Bank of America Corp. v. Superior Court*, *supra*, 198 Cal.App.4th at pp. 870-871; accord, *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336.)

2. *Magnum’s Proposed Findings Are Not Compelled as a Matter of Law; Its Appeal Is a Misguided Effort To Reargue the Evidence*

Magnum contends reversal is required because the court “failed to rule” on its argument that the May 2011 listing agreement required Prince to share his sales commission in the transaction. In fact, the court did rule on this issue; it simply rejected Magnum’s interpretation of the evidence. The court found Prince credible and Caamano and Meraz not credible and impliedly found the May 2011 listing agreement did not apply to this transaction. Magnum’s arguments to the contrary are nothing more than a misplaced effort to reargue the evidence on appeal. (See *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398-399 [Ford’s “attempt to reargue on appeal those factual issues decided adversely to it at the trial level [is] contrary to established precepts of appellate review”]; *People v. Thompson* (2010) 49 Cal.4th 79, 125 [“[w]e reject defendant’s attempt to reargue the evidence on appeal and reiterate that ‘it is not a proper appellate function to reassess the credibility of witnesses’”]; *San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1282 [same].)

Magnum contends the court’s finding is wrong as a matter of law because it ignores Prince’s “judicial admission” made during his trial testimony in which he effectively “conceded” the

applicability of the May 2011 listing agreement to this transaction. Apart from mischaracterizing trial testimony as a judicial admission,<sup>5</sup> Magnum misstates Prince's testimony. Prince did not concede at trial that the May 2011 listing agreement governed this transaction nor is that the only conclusion to be drawn from his submission of that agreement to escrow in conjunction with his January 2012 demand letter. To the contrary, Prince testified the May 2011 listing agreement was a back-up agreement to be used only in the event CIM Financial's acquisition of the property had been abandoned and a new purchaser substituted in escrow. The court found Prince credible and impliedly found his explanation reasonable and consistent with the language of the May 2011 listing agreement, which included different terms (for example, a higher purchase price) from those agreed to by the parties in this transaction. Moreover, as the court observed at trial, even if the May 2011 listing agreement did apply to this transaction, it merely made Prince, rather than Hanshaw, liable for any payment due Magnum. Because Prince disclosed the fact he was receiving a commission and there was no evidence of any agreement with Magnum to

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<sup>5</sup> A judicial admission "may be made in a pleading, by stipulation during trial, or by response to request for admission." (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746; see *ibid.* ["[f]acts established by pleadings as judicial admissions are "conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted by the party whose pleadings are used against him or her"""]; *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 456 [same].) A judicial admission is "entirely different" from evidence presented at trial. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 452, p. 585 [a judicial admission is not evidence and, in fact, is "fundamentally different from evidence[;] [i]t is a waiver of proof of a fact by conceding its truth, and it has the effect of removing the matter from the issues"].)

share in that commission, the court found Magnum had not proved Prince suppressed any material fact. That finding, too, is amply supported.

Magnum suggests a different inference is possible from the evidence presented. That may well be, but Magnum's interpretation is by no means the only plausible one; and the court rejected it as being against the weight of the evidence. Magnum simply cannot clear the very high hurdle on appeal of demonstrating its version of the evidence was compelled as a matter of law. (See *Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486 ["Where as here, the judgment is against the party who has the burden of proof, it is almost impossible for him to prevail on appeal by arguing the evidence compels a judgment in his favor. That is because unless the trial court makes specific findings of fact in favor of the losing plaintiff, we presume the trial court found the plaintiff's evidence lacks sufficient weight and credibility to carry the burden of proof" ]; see also *Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838 ["where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law"].)

Magnum's remaining arguments, including that the trial court failed to rule on his contentions that Prince, purportedly acting as a dual agent, breached his duty to Caamano, are all premised on the allegation that Prince concealed the May 10, 2011 agreement from Magnum and Caamano. As discussed, the court found Prince made the proper disclosures in January 2011; and the May 10, 2011 listing agreement did not create a new obligation in this transaction. Those findings are amply supported by the language of the agreement and by Prince's

testimony.<sup>6</sup> No further findings were required to dispose of Magnum's fraud and concealment claims, which were the only claims at issue in this case.<sup>7</sup>

### DISPOSITION

The judgment and postjudgment order awarding Prince and Prince Commercial Real Estate Services, Inc. attorney fees are affirmed. Prince and Prince Commercial Real Estate Services, Inc. are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.

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<sup>6</sup> Amicus curiae's brief is limited to arguing the trial court erred in concluding Prince had no duty to disclose to all cooperating brokers the obligation to pay a cooperating broker expressly identified in the May 10, 2011 listing agreement. Because the trial court found that agreement did not apply to this transaction, a finding supported by the language of the agreement and by substantial evidence, we do not address that issue.

<sup>7</sup> Because we affirm the judgment in favor of Prince and no separate argument was presented by Magnum directed to the postjudgment award of fees (see fn. 4, above), we affirm the postjudgment order as well. (See *StaffPro, Inc. v. Elite Show Services, Inc.* (2006) 136 Cal.App.4th 1392, 1408, fn. 16.)