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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

PAULETTE LAMBERT,

Plaintiff and Respondent,

v.

PATRICK HODGE, et al,

Defendants and Appellants.

2d Civil No. B233216
(Super. Ct. No. 56-2010-00368941)
(Ventura County)

Patrick and Rodora Hodge (appellants) agreed to sell real property to Paulette Lambert (respondent), Patrick's sister. After respondent made a \$100,000 payment and performed other terms of their agreement, appellants refused to transfer title to her or return her money. Following a nonjury trial, the trial court entered judgment in favor of respondent on causes of action for negligent misrepresentation and money had and received, ordering appellants to pay respondent \$206,701.78. Appellants, who represented themselves at trial and on appeal, contend the judgment violates Rodora's "constitutional and civil rights" because she was not personally involved in the transaction, that there is no substantial evidence they negligently misrepresented any facts, that the contract is illegal and that respondent waited two years before she complained about the failure to transfer title to her. We affirm.

Facts

Respondent testified that in 2006, her brother agreed to sell her an undeveloped piece of real estate in Agora Hills for \$200,000 if respondent would subdivide the property into two lots, transfer one of the lots back to appellants and give them an easement for access across respondent's lot. The parties also agreed that respondent would make a down payment of \$100,000. Appellants would not spend the \$100,000 until a soils test performed on the property returned a positive result. If the test result was positive, respondent would pay the balance and continue to develop and subdivide the property. If the test was not positive, appellants would return respondent's money.

Respondent performed as promised. In July 2006, she paid appellants \$100,000. In April 2007, respondent had the soils test performed. The result was positive. Respondent also paid for a grading plan, additional soils work, structural engineering and architectural plans pertaining to the property. In October 2007, respondent learned that she would be unable to complete the process of subdividing the property because her name did not appear on the title to it. She also learned that Los Angeles County prohibited her from performing any grading work on the property until April 2008, because it was the rainy season. When respondent told appellants that she could not complete the subdivision until they transferred title to her, appellants raised their price. They refused to complete the sale for less than \$325,000. Respondent stopped all development work and demanded return of her \$100,00 payment. Appellants refused.

In August 2009, the parties met at a family gathering. Appellants agreed to sell the property to respondent for \$225,000. Respondent raised the additional money from a friend and agreed to pay the increased purchase price. Appellants again refused to complete the transaction and returned to the asking price to \$325,000. Respondent rejected the increased price and demanded return of her \$100,000. Appellants refused. Respondent filed her complaint on March 4, 2010.

In his trial testimony, Patrick Hodge admitted that he had originally agreed to sell a portion of the property to respondent for \$200,000, if she obtained positive soils test results, took the steps necessary to subdivide the property into two lots, transferred one lot to him and gave him an easement for access to the lot. He did not agree to leave respondent's \$100,000 down payment untouched until after the soils test results were obtained. Patrick testified he had no specific reason for not wanting to put respondent's name on the title to the property. He testified he did not believe respondent was "at the stage of needing to be on title[,] " although he did not explain how she could subdivide it without being named on the title. He also testified that no one from respondent's engineering firm had ever contacted him to ask that she be placed on the title. Rodora Hughes did not testify.

After a one-day trial, the trial court found in favor of respondent, awarding her over \$200,000 in damages, pre-judgment interest and costs. Appellants, who remain self-represented, contend the judgment should be reversed because appellant Rodora Hodge was not involved in any of the negotiations with respondent, respondent failed to "satisfy the elements of her cause of action for 'negligent misrepresentation,' the alleged contract violates the statute of frauds, and respondent waited nearly two years before she asked to be placed on title to the property." None of these contentions has merit.

Discussion

Our review of the judgment is limited to the question of whether there is any substantial evidence to support the findings of the trial court. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1489, quoting *Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138, 143.) We " 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor ' " (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, quoting *Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) "Credibility is an issue for the fact finder. As we have repeatedly stated, we do not reweigh evidence or reassess the credibility of witnesses. [Citation.] ' "We have no power to judge of the effect or value of the evidence, the weigh the evidence, to consider the credibility of the witnesses, or to

resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. [Citations.]" (*In re Stephen W.* (1990) 221 Cal.App.3d 629, 642.)' " (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622.)

Judgment Against Rodora Hodge

Rodora Hodge contends unspecified constitutional and civil rights were violated by the judgment because there is no evidence that she had anything to do with the agreement between Patrick Hodge and respondent. We disagree. The evidence demonstrates that respondent transferred \$100,000 into an account jointly held by appellants, as a down payment on real property jointly owned by them. Respondent received nothing of value in exchange for that money from either appellant. Neither appellant returned the money to respondent after she demanded it. There was no evidence that Rodora Hodge was unaware of the agreement, the wire transfer, or the refusal to either transfer title to respondent or refund her money. These facts constitute substantial evidence in support of the judgment against Rodora Hodge. (See e.g., *Supervalu v. Wexford Underwriting Managers* (2009) 175 Cal.App.4th 64, 78-79 [money had and received].)

Substantial Evidence

Appellants contend no substantial evidence supports the judgment against them on respondent's cause of action for negligent misrepresentation. They are incorrect. The evidence established that appellants agreed to transfer title to the property to respondent for \$200,000. Respondent was to develop and subdivide the property into two lots, transfer one of the lots back to appellants and grant them an easement for access to their lot. Respondent agreed to make a \$100,000 down payment and conduct a soils test on the property. If the test had a positive result, respondent would appellants the balance of the purchase price, receive title and subdivide the property. If the test had a negative result, appellants would return the down payment to respondent. Respondent made the down payment, obtained a positive result on the soils test and pursued developing and subdividing the property. Appellants refused to transfer title to her,

preventing her from completing the subdivision process. They also refused to return the \$100,000 down payment. Appellants produced no evidence contradicting respondent's testimony concerning the terms of their agreement, nor did they produce any evidence explaining their refusal to perform the agreement. Respondent's testimony is substantial evidence that appellants misrepresented their willingness to perform the agreement by transferring title to respondent. (See, e.g., *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243 [elements of negligent misrepresentation claim].)

Illegal Contract

Appellants contend the contract with respondent is illegal because it violates the statute of frauds. (Civ. Code, § 1624.) The statute of frauds is an affirmative defense that is waived if it is not pleaded in the answer. (*Walton v. City of Red Bluff* (1991) 2 Cal.App.4th 117, 131.) Appellants did not plead this defense in their answer and have, as a result, waived it. Moreover, appellants would have had the burden to prove all facts essential to the defense. They introduced no such evidence. Thus, had the defense been included in their answer, it would have failed. (*Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1309.)

Appellants contend they have not waived the defense by failing to raise it below because respondent's failure to comply with statute of frauds renders their oral contract "illegal," and illegality may be raised at any stage of the proceedings, including for the first time on appeal. Appellants are incorrect. Failure to comply with Civil Code section 1624 may render an oral contract unenforceable, but not illegal. (*Walton, supra*, 2 Cal.App.4th at p. 131.) Even where an oral contract violates the statute of frauds, it may be enforced where, as here, one party " 'by words or conduct, represents that he [or she] will stand by his [or her] oral agreement, and the other party, in reliance upon that representation changes his [or her] position, to his [or her] detriment.' " (*Garcia v. World Sav., FSB* (2010) 183 Cal.App.4th 1031, 1040, fn. 10, quoting *Associated Creditors' Agency v. Haley Land Co.* (1966) 239 Cal.App.2d 610, 617.)

Timeliness

Appellants contend that respondent waited until October 2007, nearly two years after their initial agreement, before asking to be placed on the title to the property. They claim this was their first notice that respondent could not subdivide the property unless she was named on the title and this fact somehow undermines her claim. The trial court, however, credited respondent's testimony in this regard. We may not second-guess that determination. (*Johnson v. Pratt & Whitney Canada, Inc.*, *supra*, 28 Cal.App.4th at p. 622.)

Conclusion

The judgment is affirmed. Costs on appeal to respondent.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Rebecca Susan Riley, Judge
Superior Court County of Ventura

Patrick Hodge and Rodora Hodge, in pro per, Appellants.

James B. Devine and Taylor Emerson, Leiderman Devine, for Respondent.