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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DNI FOOD SERVICE, INC., DBA ZAYA'S BISTRO, et al., Cross-complainants and Appellants, v. SUSAN H. KIM et al., Cross-defendants and Respondents.	B266596 (Los Angeles County Super. Ct. No. NC057573)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael P. Vicencia, Judge. Affirmed.

Law Offices of James P. Wohl and James P. Wohl for Cross-complainants and Appellants.

Dentons US, Jules S. Zeman, Melinda M. Carrido; Carlson Law Group, Mark C. Carlson and Stuart T. Miller, for Cross-defendants and Respondents.

Lessor owns a small, multi-tenant retail building. The State of California, Department of Transportation (Caltrans) notifies Lessor that two parcels of Lessor's land will be affected by a nearby freeway expansion project. The building itself is not on either parcel, and five of the six tenant spaces in the building are already vacant. Caltrans intends to acquire a small sliver of the land between the street and the building and exercise a temporary construction easement over the sidewalk and a portion of the landscaping on one side. In this opinion, we will refer to the planned acquisition and easement as the Caltrans Taking. Real estate agents (Agents) working for Lessor are in communication with Caltrans.

Around the same time, Agents advertise tenant space in the building, highlighting that rents are being dramatically reduced and the property "is situated in a great location. Conveniently located off the 5 Fwy. . . ." Lessees, a food services company and its sole owner, see the advertisement and contact Agents. Lessees initially seek a two-year lease, but ultimately sign a five-year lease with a personal guarantee, beginning in November 2011. After expending time, money, and effort, Lessees open a restaurant in March 2012.

On June 1, 2012, Caltrans serves an eminent domain complaint on Lessor, Lessees, and other defendants. The complaint is the first notice Lessees receive about the Caltrans Taking. Lessees close the restaurant on August 31, 2012.

The primary issue on appeal is whether Lessees state a cause of action for fraud based on Agents' failure to disclose the Caltrans Taking. Lessees' claims are premised on the theory that Agents should have disclosed information they possessed about a planned freeway expansion that would affect the commercial property they were leasing. Lessees also claim Agents misrepresented historical rents in advertisements for the property. We find no error in the order sustaining demurrers to Lessees' causes of action for fraud and intentional infliction of emotional distress or the order granting summary judgment on their false advertising claim. Accordingly, we affirm the judgment.

PROCEDURAL HISTORY

Within the eminent domain proceeding initiated by Caltrans, Lessees (cross-complainants and appellants DNI Food Service, Inc. dba Zaya's Bistro and Myo Keyong Wie) filed a cross-complaint against Lessor (cross-defendant BYC Leader Venture, LLC[1]) and Agents (cross-defendants and

[1] Both Lessor and its owner Jack Lin were named as cross-defendants, but they are not parties to this appeal.

respondents Susan H. Kim, Sam Kim, Century-21 Sunny Hills,[2] and Donald Yang[3]). After the court sustained a demurrer to the original cross-complaint, Lessees filed an amended pleading, followed by a second amended cross-complaint (SACC).[4]

The court sustained Agents' demurrer to the SACC without leave to amend as to three causes of action: (1) fraudulent deceit; (2) fraud in the execution; and (3) intentional infliction of emotional distress. The court's written ruling sustained the demurrer to the second and third causes of action for fraud "on the grounds that the failure to disclose the eminent domain proceeding was not a material fact" and to the fourth cause of action for intentional infliction of emotional distress "on the grounds that the failure to disclose the eminent domain proceeding was not a material fact and did not constitute fraud, and therefore the conduct complained of did not rise to the level of intentional infliction of emotional distress."

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[2] The cross-defendant identified as Century-21 Sunny Hills is Charles Seonchul Kim, D/B/A Century-21 Sunny Hills.

[3] Donald Yang was not named in the original cross-complaint, but was later substituted in as a Doe Defendant.

[4] The record does not reflect a demurrer to the amended cross-complaint, and it appears that Lessees voluntarily filed the SACC to supersede the amended cross-complaint.

The court subsequently granted summary judgment on Lessees' remaining claim for violation of Business and Professions Code section 17500 et seq. (the False Advertising Law or FAL).[5]

STATEMENT OF FACTS

Relevant facts from second amended cross-complaint

At the heart of this dispute is real estate owned by Lessor, including a building containing six retail spaces. In June 2011, Caltrans advised Lessor that a condemnation action affecting the property would be filed. Agents acted as Lessor's agents in dealings with Caltrans and Lessees. Lessor received a "Notice of Decision to Appraise" stating Caltrans was "currently undertaking a transportation project to widen the Interstate 5 freeway." Caltrans sought to appraise the property to determine just compensation. In August 2011, Caltrans sent a second "Notice of Decision to Appraise," conducted an inspection of the property, and notified Lessor of the right to claim loss of business goodwill.

A September 2011 appraisal analysis gave details about the planned scope of the Caltrans Taking. Caltrans was appraising two connected parcels on Lessor's property. The first parcel was a fee acquisition "needed in conjunction

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[5] All further statutory references are to the Business and Professions Code unless otherwise stated.

with the widening of the I-5, located just south of the subject property. . . . [T]his fee area varies in width from 2 feet wide at the north end to 4 feet wide along the southern end." The description continues, "The small sliver of land is specifically required for the re-alignment of Norwalk Boulevard and sidewalk replacement." Adjacent to the first parcel, Caltrans would establish a temporary construction easement (TCE) that would be five feet wide and exist for a term of 33 months, from March 2012 until December 2014. The square footage of the TCE was 1,924 square feet. Neither parcel impacted the building on the property.

In September 2011, Wie saw an internet advertisement for tenant space on the property. The advertisement was placed by Agents and stated, in relevant part: "NEW OWNER RENT SALE!!! MORE THAN HALF OFF PREVIOUS RENTS. Former restaurant spaces located within the Norwalk Entertainment Center. . . . Former tenants were paying over $3.50 psf base rent plus over $1.00 in CAM charges. New management is currently leasing at $1.50 psf plus $.65 CAM charges, with generous initial move in concessions consisting of free rent and additional reduced rent. Excellent location located directly next to the Norwalk AMC 20 Plex Movie Theater and within walking distance of the Superior Court, Norwalk Civic Center, LA County Recorder's Office and numerous office complexes. [¶] This property is situated in a great location. Conveniently located off the 5 Fwy. . . ."

Agents met with Wie at the property in late

September, touting the space as an excellent opportunity and assuring Wie that the Landlord was offering a very good deal. Agents explained that the property was mostly vacant "because the cost to rent [tenant space] had been extremely high, at more than $3.50 per square foot, but that the landlord was currently offering [tenant space] at a reduced rate." Agents did not disclose the Caltrans Taking to Lessees and intentionally concealed the information about the Caltrans Taking. Wie sought to enter into a two-year lease, but Agents demanded a five-year lease, with a personal guarantor. In October 2011, Lessees executed a lease for tenant space at the property, including a personal guaranty by Wie. The lease took effect November 1, 2011, with a term of five years six months. Lessees were renting Unit A on the property, which was the unit farthest away from the area of the Caltrans Taking. The lease terms provided that base rent and CAM charges were waived/abated from November 1, 2011, through April 30, 2012. Beginning May 1, 2012, Lessees would owe $286.95 in base rent, with estimated CAM charges of $1,243.45. Effective November 1, 2012, base rent was scheduled to increase to $2,295.60, and then would not increase again until November 1, 2014.

In December 2011, Caltrans revised its appraisal, reducing the area of land acquisition to 510 square feet and increasing the area of the TCE from 1,924 square feet to 2,678 square feet.

Lessees expended time and resources remodeling and

equipping the restaurant. They brought a "highly respected chef to provide excellent cuisine" and advertised and promoted the business. Lessees were unaware of the Caltrans Taking until they were served with the eminent domain complaint on June 1, 2012. If Wie had known about the Caltrans Taking, she would have never signed the lease or even spoken with Agents. As a result of receiving the eminent domain complaint, Wie suffered debilitating physical problems, including a loss of hearing and feeling.

Relevant facts from summary judgment motion

The prior owner of the building had given Sam Kim, one of the Agents, a rent roll in connection with Lessor's purchase of the property in April 2011. The rent roll indicated that as of December 31, 2009, tenant payments ranged from $2.58 to $3.16 per square foot, and that for one tenant, base rent was scheduled to increase to $3.55 per square foot, effective July 1, 2012. Sam Kim relied on the rent roll as a fair and accurate accounting of the rents and fees being paid by former tenants of the property. After Lessor purchased the property, Sam Kim was retained to manage the property. He prepared the internet advertisement that stated, in pertinent part, "NEW OWNER RENT SALE!!! MORE THAN HALF OFF PREVIOUS RENTS. Former restaurant spaces located within the Norwalk Entertainment Center. . . . Former tenants were paying over $3.50 psf base rent plus over $1.00 in CAM

charges. New management is currently leasing at $1.50 psf plus $.65 CAM charges, with generous initial move in concessions consisting of free rent and additional reduced rent."

Lessees opened their restaurant on March 2, 2012. After receiving the eminent domain complaint, Wie decided to close the restaurant on August 30, 2012.

DISCUSSION

Demurrer

Standard of review

"We independently review the ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action. [Citation.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken. [Citation.] We construe the pleading in a reasonable manner and read the allegations in context." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111.) "We not only treat the demurrer as admitting all material facts properly pleaded, but also 'give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]' [Citation.]" (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.)

Fraud and fraud in the execution

Lessees contend their SACC adequately stated causes of action for fraud because the factual allegations established Agents' duty to disclose the impending Caltrans Taking. They also argue that the allegations of causation and damages were sufficient to survive demurrer. Agents contend that the court correctly sustained the demurrer because the Caltrans Taking was not a material fact they were required to disclose. Agents further argue that the complaint inadequately pleads justifiable reliance and causation.

"The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990.) "To maintain a cause of action for fraud through nondisclosure or concealment of facts, there must be allegations demonstrating that the defendant was under a legal duty to disclose those facts." (*Los Angeles Memorial Coliseum Com. v. Insomniac, Inc.* (2015) 233 Cal.App.4th 803, 831.) It is well-settled under California law that a property owner is under a duty to disclose material facts affecting the value or desirability of the property, if it is known that such facts are not known to or within the reach of the diligent attention and observation of

a buyer. (*Calemine v. Samuelson* (2009) 171 Cal.App.4th 153, 161; *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1382 (*Alfaro*).) When the seller's real estate agent or broker is also aware of such facts, "he [or she] is under the same duty of disclosure." (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 736 (*Lingsch*).) The duty to disclose applies not just to sales of residential property, but also to transactions involving commercial properties (*Stevenson v. Baum* (1998) 65 Cal.App.4th 159, 165 [sale of a mobile home park with an oil and gas easement running underneath]) and leases of more than one year (10 Miller & Starr, Cal. Real Estate (4th ed. 2016) § 34.111, pp. 34-346–347 ["[a] leasehold interest with a term in excess of one year is an estate in real property"]; see also *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 868 [analyzing agent's duty to disclose in a commercial lease transaction]).

So long as the materiality of a particular piece of information has been adequately pleaded, it is a question of fact that generally cannot be determined on demurrer. (See, e.g., *Reed v. King* (1983) 145 Cal.App.3d 261 [the materiality of the fact that a woman and her four children were murdered in a house 10 years earlier cannot be determined on demurrer]; *Lingsch*, *supra*, 213 Cal.App.2d at p. 737 [reversing judgment on demurrer and noting "whether the matter not disclosed by the seller or his agent is of sufficient materiality to affect the value or desirability of the property . . . depends on the facts of the particular case"].)

"[O]ne false representation of a material fact is sufficient . . . to sustain an action for damages for fraud, provided the representation be such that the court can say that without it the contract would not have been entered into." (*Feckenscher v. Gamble* (1938) 12 Cal.2d 482, 492.)

A fact is material if it has an effect on the value or desirability of the property. (*Alfaro*, *supra*, 171 Cal.App.4th at p. 1374 [deed restriction would tend to depress market value]; *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544–1548 [duty to disclose noisy neighbors].) In *Reed v. King*, *supra*, 145 Cal.App.3d 261, the appellate court found a sufficiently pleaded fraud cause of action based on allegations that the homeowner and his agent knew and failed to disclose that a murder had taken place in the house 10 years earlier. In reversing the judgment, the Court of Appeal explained the plaintiff had adequately alleged "the fact of the murders has a quantifiable effect on the market value of the premises. [Fn. omitted.] We cannot say this allegation is inherently wrong and, in the pleading posture of the case, we assume it to be true. If information known or accessible only to the seller has a significant and measurable effect on market value and, as is alleged here, the seller is aware of this effect, we see no principled basis for making the duty to disclose turn upon the character of the information. Physical usefulness is not and never has been the sole criterion of valuation." (*Id.* at p. 267.) Noting that negative facts concerning the character of a property can depress its value, the court continued, "Failure to disclose

such a negative fact where it will have a foreseeably depressing effect on income expected to be generated by a business is tortious. [Citation.]" (*Ibid.*)

In the case before us, the SACC alleges Agents knew about the planned Caltrans Taking and failed to disclose that fact while simultaneously touting the property's excellent location and convenient proximity to the freeway. The trial court found the Caltrans Taking to have such a minimal impact on the value of the lease that it was not a material fact giving rise to a duty to disclose. At oral argument, the court stated it planned to sustain the demurrer to the fraud causes of action because "the taking at issue, the small piece of landscaping at the opposite end of the development from Unit A, is not material; it wouldn't cause [*sic*] a material fact for purposes of fraud." The exhibits to the SACC demonstrate that the size of the Caltrans taking was minimal and unlikely to have a negative impact on plaintiff's business.[6] We conclude the allegations of the SACC did not adequately state a claim for fraud or fraud in the execution because as a matter of law, the impact of the Caltrans Taking was not material. The trial court correctly ruled the Caltrans Taking did not rise to

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[6] Even liberally construing the pleading, there is no basis for an inference that the Caltrans Taking and construction activity on Norwalk Boulevard was likely to have a negative impact on foot traffic from the nearby courthouse, civic center, and movie theater, considering the scope of the taking and its location nowhere near Lessees' restaurant.

a duty to disclose.

Even if there was a duty to disclose, the allegations concerning causation and damages are also inadequate. After the court sustained the demurrer to the fraud causes of action, subsequent discovery revealed that Lessees closed the restaurant at the end of August 2012, within months of learning of the eminent domain proceeding, but before any construction had started. A copy of the lease agreement also shows that Lessees did not owe *any* rent until May 2012, and that the amount of rent due under the lease was significantly reduced between May and November of 2012. It is difficult to imagine what factual allegations could be sufficient to demonstrate that the Agents' failure to disclose the Caltrans Taking caused Lessees damages, rather than Wie's decision to close the business after only six months, even before full rental payments were due.

Intentional infliction of emotional distress

Wie[7] contends that because Agents knowingly failed to disclose the planned Caltrans Taking, they acted in reckless disregard to the emotional distress the information would cause her.

To state a cause of action for intentional infliction of emotional distress, a complaint must allege: (1) extreme and

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[7] The SACC correctly alleges that only Wie is asserting a cause of action for intentional infliction of emotional distress.

outrageous conduct the defendant either intended to cause emotional distress or recklessly disregarded the probability of causing emotional distress; (2) severe or extreme emotional distress; and (3) actual and proximate causation. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050.) Outrageous conduct is conduct so extreme that it exceeds the bounds of what would usually be tolerated in a civilized community. The conduct must be intentional, meaning the actor engages in the conduct knowing injury is likely to result. (*Id.* at pp. 1050–1051.) The distress caused must be of such a substantial or enduring quality that no reasonable person should be expected to suffer such distress without recourse. (*Id.* at p. 1051.) Regular business dealings such as lease negotiations are not usually the type of "outrageous conduct" that would lead to liability for intentional infliction of emotional distress. (See, e.g., *Unterberger v. Red Bull North America, Inc.* (2008) 162 Cal.App.4th 414, 423 [as a matter of law, the termination of a business relationship is not the type of outrageous conduct necessary to support a cause of action for intentional infliction of emotional distress].)

Taking the allegations of the SACC as true, the conduct alleged is legally insufficient to state a claim for intentional infliction of emotional distress, because no outrageous conduct is alleged.

Summary judgment on false advertising claim

Lessees present various challenges to the order

granting summary judgment on their FAL claim. They fail to demonstrate error.

Standard of review

"The standard for deciding a summary judgment motion is well-established, as is the standard of review on appeal." (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 572.) "We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. [Citation.]" (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181 (*Garrett*).)

We apply a different standard of review to evidentiary rulings made in connection with a motion for summary adjudication. (*Garrett*, *supra*, 214 Cal.App.4th at p. 181.) In accordance with the weight of authority, we review the trial court's evidentiary rulings for an abuse of discretion. (*Ibid.*; *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852 (*Serri*); *Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335.) The party challenging the ruling has the burden on appeal to establish an abuse of discretion, which we find only if the trial court's decision exceeds the bounds of reason. (*Serri*, *supra*, at p. 852.) "'Such evidentiary questions, however, are subject to the overarching principle that the proponent's submissions are scrutinized strictly, while the opponent's are viewed

liberally.' [Citation.]" (*Ibid.*)

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476–477.)

False advertising claim

As relevant to this case, it is a violation of section 17500 for any person intending to dispose of real property by an internet advertisement to make any statement, "concerning that . . . property . . . , or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of

reasonable care should be known, to be untrue or misleading, ..." (§ 17500.) The statutory language has been "interpreted broadly to embrace not only advertising which is false, but also advertising which although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. [Citations.]" (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 626.) Advertising is misleading if a reasonable consumer is likely to be deceived. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211, superseded on other grounds as stated in *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242; *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 682.)

In the current case, Lessees point to two potentially false or misleading statements, but they fail to demonstrate a triable issue of material fact as to either one.

1. Historic rents

Lessees contend that the internet advertisement placed by Agents falsely stated that "Former Tenants were paying over $3.50 psf base rent plus over $1.00 in CAM charges." The court correctly granted summary judgment because Lessees cannot show a triable issue of material fact on two key elements of their FAL claim.

First, Agents provided admissible evidence that the advertisement's statements about prior rents were not likely

to deceive a reasonable consumer. The rent roll from 2009 showed that one former tenant was scheduled to pay $3.55 in base rent beginning in July 2012. Two tenants on the rent roll were scheduled to pay over $3.00 in base rent effective July or August 2011, and based on that information, the advertisement correctly stated that the new owner was offering "more than half off previous rents."

The only evidence Lessees offer in response is Wie's deposition testimony that prior tenants claimed to be paying between $2.00 and $2.50 per square foot. The court sustained the Agents' objection to that evidence, and we find no abuse of discretion. Even if the statement was admissible, it is inadequate to establish that the Agents knew or reasonably should have known that their statements were false. (See *People v. Forest E. Olson, Inc.* (1982) 137 Cal.App.3d 137, 139 [corporation can be liable for misleading statements when it has ability to but fails to verify facts which would put a reasonable person on notice of possible misrepresentations].)

Second, Lessees have not raised a triable issue of material fact as to causation. Wie claims that had she known prior tenants were paying less than $3.55 per square foot, she would have negotiated more favorable lease terms. This claim ignores the fact that she negotiated six months of free rent, followed by five months of paying base rent of just 15 cents per square foot, and then two years of only $1.20 per square foot in base rent. Lessees cannot show that they were misled in a way that caused any harm.

2. Great location

Lessees also claim that the advertisement's claim that the building was in a "great location" gave rise to liability under section 17500, because Agents knew of the impending expansion of Interstate 5, and failed to disclose that information. For the same reasons stated in our discussion of Lessees' fraud claims, plaintiffs cannot establish that the description of the property as being in a great location was false or misleading, given that it remained in walking distance of a movie theater, courthouse, and civic center.

Other challenges to summary judgment

A number of Lessees' remaining arguments are simply inapposite to the question of whether the court properly granted summary judgment on their FAL claim. Lessees argue they have standing under section 17500 and Proposition 64 does not bar their claim, but both of these arguments fall aside because Lessees have not shown a triable issue of material fact on their FAL claim. Their argument that they are entitled to restitution under the FAL puts the cart before the horse, as the question of restitution does not arise if the FAL claim fails. The argument that Agents are liable for failing to disclose the pending Caltrans Taking pertains to their fraud causes of action, not their false advertising claim.

We are unpersuaded by Lessees' remaining arguments. Whether the evidence presented by Agents adequately complied with the applicable rules of court is left to the trial court's discretion, and we find no abuse of discretion. We also reject the argument that the trial court impermissibly made a blanket ruling overruling all of Lessees' evidentiary objections and sustaining all of the Agents' objections. The court ruled on each objection separately and sustained two of the objections raised by Lessees. We find no abuse of discretion.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to BYC Leader Venture, LLC, Susan H. Kim, Sam Kim, Charles Seonchul Kim, D/B/A Century-21 Sunny Hills (erroneously sued as Century-21 Sunny Hills), and Donald Yang.

KRIEGLER, J.

We concur:

TURNER, P.J.

KIN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.