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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ANGELA HSIAO,

Plaintiff and Appellant,

v.

YANFEI LIN, an individual, et al.,

Defendants and Respondents.

B271296 c/w B272366

(Los Angeles County
Super. Ct. No. EC062622)

APPEAL from a judgment of the Superior Court of Los Angeles County. William D. Stewart, Judge. Affirmed in part and reversed in part.

Vincent Y. Lin for Plaintiff and Appellant.

Gary Hollingsworth for Defendants and Respondents.

Angela Hsiao (buyer) signed a contract to purchase a home from Yanfei Lin (seller). Seller did not sign the contract; her adult son signed it in her name. When seller refused to proceed with the sale, buyer brought suit for breach of contract and related causes of action. Seller, relying on the statute of frauds and the equal dignities rule, prevailed on summary judgment. She also received her attorney's fees as the prevailing party on a contract which contained an attorney's fees clause. On buyer's appeal, we affirm the summary judgment, but reverse the attorney's fees order, on the basis that seller had not complied with a contractual condition precedent to an award of fees.

FACTUAL AND PROCEDURAL BACKGROUND

1. Underlying Facts

While the vast bulk of the facts are disputed, the dispositive ones are not. Seller owned a house in Arcadia. In November 2013, while she was away in China, a real estate agent, who may or may not have been acting with her authorization, listed her house for sale. Buyer, acting through a real estate agent, submitted a written offer on the property. Counter-offers were exchanged, resulting in what buyer believed was a signed purchase agreement.

Buyer acted only through her agent; she did not communicate directly with seller during this process. It is not clear whether, at the time the contract was signed on behalf of

seller, buyer knew that seller did not personally sign it. However, it is now undisputed that seller's son had signed seller's name to the contract. It is also undisputed that seller never executed a written document granting her son authority to sign the contract on her behalf. According to buyer, seller had "promised to send a notarized authorization granting her son authority to sign the [p]urchase [a]greement as soon as possible after he signed the [o]ffer and opened escrow." The purportedly promised authorization, however, never materialized.¹

Buyer opened escrow, submitted her deposit, and was hopeful that the sale would occur, but it never did. At one point, in January 2014, seller's husband signed (in seller's name) a form cancelling the sale. Buyer signed it as well, but added in a term requesting \$10,000 "as Reparation to buyer + inspection fee." As seller did not agree to pay the \$10,000, the escrow remained open.

The standard form purchase agreement, which is part of the alleged contract, contains a prevailing party attorney's fees

¹ According to the declaration of the agent who claimed to be acting for seller, he spoke to seller and her husband on the telephone, and it was agreed that their son would sign the purchase agreement and seller would then notarize any necessary authorization at the U.S. consulate in China. Seller's agent does not explain why he did not simply have seller sign the agreement and fax it back.

clause. It also contains a mediation clause, which provides that if any party commences an action without first attempting to mediate, or refuses to mediate after a pre-lawsuit request has been made, that party “shall not be entitled to recover attorney fees.” Buyer requested mediation; seller refused to participate.

In May 2014, seller, by grant deed, deeded the property to herself and her husband, as joint tenants.

2. *Complaint*

Buyer brought suit against seller, her husband, and her son. The operative pleading is the first amended complaint. After seller successfully demurred to some causes of action, buyer’s complaint against seller alleged: (1) breach of contract; (2) specific performance; and (3) fraudulent conveyance (regarding the transfer to seller and her husband).

3. *Motion for Summary Judgment*

Seller moved for summary judgment on the remaining three causes of action. She argued that all three causes of action depended on a valid contract of sale, and there was no valid contract due to the statute of frauds. To the extent buyer alleged that seller had appointed her son as her agent to sign the contract on her behalf, seller argued that the equal dignities rule required such agency to be in writing. Since there was no such

writing, seller argued the agency was invalid, and her son's signature could not effectively bind her to the contract.²

Seller supported the motion with declarations of herself, her husband, and her son. Buyer would successfully object to the declarations of seller and her husband, due to the fact that seller and her husband speak Chinese, and their English language declarations were hearsay documents prepared by their counsel, which they could not have understood when they signed them. However, seller's son's declaration was sufficient to establish the key fact that he, rather than seller, signed the purchase agreement.

4. *Opposition*

In opposition, buyer argued that seller had agreed to sell buyer the property, but simply got "cold feet." Buyer argued that seller was estopped from relying on the statute of frauds and equal dignities rule because seller and her family "clearly lulled [buyer] into believing" seller's son had authority to sign the contract on seller's behalf. She stated that the transaction had appeared to proceed normally, through the agents, and that she was unaware of any issue regarding seller's signature. She

² As an alternative basis for summary judgment, seller argued that buyer could not establish that she had substantially performed her obligations under the contract, as she had failed to establish she possessed sufficient funds to close the all-cash sale. Due to our resolution of the statute of frauds/equal dignities rule issue, we need not reach this alternative theory.

argued that triable issues of fact existed as to whether seller's son had signed the purchase agreement with seller's knowledge and/or consent.

5. *Reply*

In reply, seller argued that it was undisputed that she had not signed the contract; her son had. Based on that fact, and the lack of evidence that the equal dignities rule had been satisfied, seller argued that she was entitled to summary judgment, even if she had orally authorized her son to sign on her behalf. Seller argued that she was not estopped to rely on the statute of frauds, as there was no evidence that buyer had changed her position such that unconscionable injury would be suffered.

6. *Summary Judgment is Granted*

After a hearing, the court granted summary judgment. The court concluded that seller, as moving party, met her initial burden of establishing the statute of frauds defense, in that her son had signed the contract instead of seller. Buyer then failed to establish a triable issue of fact existed that the son was authorized in writing to enter into the agreement on seller's behalf. While buyer argued that she was lulled into believing son was authorized, she had no evidence that seller herself engaged in any of the conduct which led her to that belief. As such, the court concluded there was no valid contract, and all three remaining causes of action failed.

Judgment was entered in favor of seller. Buyer filed a timely notice of appeal from the judgment.

7. *Prevailing Party Attorney's Fees*

Seller then moved for her attorney's fees as prevailing party on the contract, seeking more than \$100,000 in fees.

Buyer opposed the fee motion on two bases: first, she argued that seller was a non-party to the contract and therefore was not entitled to fees; second, she argued that seller lost any right to recover fees by her refusal to mediate.

Seller replied that she was entitled to attorney's fees as a nonsignatory who was sued on the contract. However, she argued she was not required to mediate, on the theory that the mediation provision "only applies to signatories to the contract."

The court awarded seller \$107,098.25 in attorney's fees, concluding that buyer "offers no legal authority holding that the [seller], who [is] not a party to the contract, is bound by "the mediation provision.

Buyer filed a timely notice of appeal from the attorney's fees award. The two appeals were consolidated.

DISCUSSION

1. *Standard of Review*

"A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail.' [Citation.] The pleadings

define the issues to be considered on a motion for summary judgment. [Citation.] As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. [Citation.]” (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) We review orders granting or denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.)

We exercise “an independent assessment of the correctness of the trial court’s ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.” (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

2. *Statute of Frauds/Equal Dignities Rule*

The statute of frauds provides that “[a]n agreement . . . for the sale of real property” is “invalid” unless it is “in writing and subscribed by the party to be charged or by the party’s agent.” (Civ. Code, § 1624, subd. (a)(3).) The equal dignities rule provides that “an authority to enter into a contract required by law to be in writing can only be given by an instrument in

writing.” (Civ. Code, § 2309.) Indeed, the statute of frauds for agreements for the sale of property specifies that “such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged.” (Civ. Code, § 1624, subd. (a)(3).)

There is no dispute that the statute of frauds and equal dignities rule were not satisfied in this case. Seller’s son signed the contract, and there was no written authorization for him to do so. The only issue is whether seller is estopped to rely on the statute of frauds and the equal dignities rule.

3. *Estoppel Does Not Apply*

There are two different forms of estoppel operative here. Estoppel to rely on the statute of frauds does not automatically establish estoppel to rely on the equal dignities rule. (*McGirr v. Gulf Oil Corp.* (1974) 41 Cal.App.3d 246, 256 (*McGirr*).

“To estop a defendant from asserting the statute of frauds, a plaintiff must show unconscionable injury or unjust enrichment if the promise is not enforced.” (*Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 944.)

In contrast, a “principal is estopped to raise the equal dignities rule against a contracting third party if the principal, by its own conduct, lulls the third party into believing that its agent has written authority to enter the contract or has no need of

written authority. [Citations.]” (*Kerner v. Hughes Tool Company* (1976) 56 Cal.App.3d 924, 934.) Alternatively, estoppel to rely on the equal dignities rule may be established when the principal, with complete knowledge of the circumstances, has received benefits resulting from its oral authorization of the agent to act. (*McGirr, supra*, 41 Cal.App.3d at p. 257.) Estoppel to rely on the equal dignities rule “is based on some conduct of the principal himself. It must be he who lulls the third person into believing that the agent has written authority or does not need it; it must be he who retains the benefits of the contract with knowledge of the circumstances.” (*Id.* at p. 258.)

Buyer has failed to establish a triable issue of fact of estoppel to rely on the statute of frauds. She has pointed to no unconscionable injury she will suffer or unjust enrichment seller will retain if the contract is not enforced. In her reply brief on appeal, she states, “Not only did she take pains to attend open houses, she prepared bids and offers, and then placed funds in escrow, and held other funds to pay for the purchase. [Citation.] Certainly those funds could have been applied to earn income for appellant.” This is not unconscionable injury, particularly when buyer could withdraw her funds from escrow at any time.

Similarly, buyer has failed to establish a triable issue as to estoppel to rely on the equal dignities rule. Buyer argues that she was lulled into believing the seller’s son had authority to sign

the contract, but can point to no conduct of seller herself which lulled her into this belief. She cannot; she concedes that she never interacted directly with seller.

On appeal, buyer argues that seller should be estopped because she knowingly and actively participated in listing the property and negotiating its sale through a real estate agent. Here, buyer confuses the doctrines of estoppel to rely on the statute of frauds and equal dignities rule with the doctrine of promissory estoppel. The latter is an equitable doctrine to satisfy the requirement of consideration when a party makes a promise the party should reasonably expect to induce action on the part of the promisee. (*Jones v. Wachovia Bank, supra*, 230 Cal.App.4th 935, 944-945.) Promissory estoppel is simply not at issue in this case. There is no dispute that the contract provided for adequate consideration; the issue is the statute of frauds and the equal dignities rule.

4. *The Attorney's Fees Award Must Be Reversed*

Buyer argues the attorney's fees award must be reversed on the bases that: (1) seller is not entitled to fees as a nonsignatory to the contract; and (2) seller is barred from recovering fees as she refused pre-lawsuit mediation. We disagree with the first contention, but agree with the second.

“On appeal, a determination of the legal basis for an attorney fees award is reviewed de novo as a question of law.

[Citation.] [¶] Each party to a lawsuit must pay his or her own attorney fees except where a statute or contract provides otherwise. [Citation.] Where a contract specifically provides for an award of attorney fees, Civil Code section 1717 allows recovery of attorney fees by whichever contracting party prevails, regardless of whether the contract specifies that party. [Citation.]” (*Cargill, Inc. v. Souza* (2011) 201 Cal.App.4th 962, 966.)

It is too late in the day to argue that a defendant, sued as a party to a contract, cannot recover prevailing party attorney’s fees if the defendant prevails by establishing the contract is not valid. A nonsignatory defendant, sued on a contract as if he were a party to it, may recover attorney’s fees when the plaintiff would clearly be entitled to attorney’s fees if it prevailed in enforcing the contractual obligation against the defendant. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128.) On appeal, buyer attempts to argue that the result should be different in this case, because a defendant can obtain fees if she wins on the merits by establishing the contract was *invalid*, but not if she prevailed by establishing the contract was *wholly nonexistent*. Apart from whether this distinction exists in the law, the factual predicate does not exist in this case. The statute of frauds declares a contract for the sale of real property “invalid” unless it is signed by the party sought to be bound. (Civ. Code, § 1624,

subd. (a).) This is not the case of a nonexistent contract, but an invalid one.

As to whether seller is barred from recovering fees by her failure to mediate, this case is governed by *Leamon v. Krajkieucz* (2003) 107 Cal.App.4th 424 (*Leamon*). In that case, the purported seller of a property sued to quiet title against the purported buyers, claiming that the contract was invalid. The jury agreed that the contract was invalid. The purported seller then sought her attorney's fees, but was denied fees because she did not fulfill the contractual condition precedent of seeking mediation before filing suit. (*Id.* at p. 426.) On appeal, the court of appeal affirmed. The issue was whether the contractual condition precedent to an award of fees applied to a litigant who prevailed by establishing the contract itself was invalid. (*Id.* at p. 432.) The court concluded that it did apply, for three reasons. First, the condition precedent was both mutual and reciprocal. (*Id.* at p. 433.) Second, "requiring a party to mediate the question of the validity of a contract does not necessarily mean that party concedes the contract is not voidable." (*Id.* at p. 433.) Third, the public policy of promoting mediation is served by requiring the parties to comply with the condition precedent. (*Ibid.*)

We find *Leamon* persuasive. The contract provided that if any party commences an action without first attempting to mediate, or refuses to mediate after a pre-filing request has been

made, that party “shall not be entitled to recover attorney fees.” While, on appeal, seller suggests there is no evidence buyer sought mediation before filing suit, the record proves otherwise. Specifically, the complaint was filed in July 2014, and had attached to it a May 2014 letter from seller purporting to accept buyer’s offer to mediate. There is also no dispute that seller ultimately refused mediation. At the hearing on attorney’s fees, seller’s counsel represented, “when they asked for mediation, we informed them that she’s not a party to the contract. She didn’t sign it. Please go away.” As buyer made a pre-filing request to mediate and seller refused it, seller is barred from recovering attorney’s fees.

Seller attempts to distinguish *Leamon* on the basis that the purported seller in *Leamon* had actually signed the contract, but had it invalidated because it was signed on duress. Seller argues this case is different because she never signed the contract. The distinction is one without a difference; in both cases, the seller sought fees pursuant to an attorney’s fees clause in a contract which she established was invalid. There is nothing in the reasoning of *Leamon* which turned on the basis on which the contract had been invalidated.

To sum up, we are not persuaded by the notion that, when a non-signatory claims entitlement to attorney’s fees, it is

entitled to those fees even though it has not satisfied the very condition precedent to an award of fees under the contract.

DISPOSITION

The judgment is affirmed. The postjudgment order awarding seller her attorney's fees is reversed. The parties shall bear their own costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.