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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

ROY GEORGE et al.,

Plaintiffs and Respondents,

v.

DOUG TIRRI,

Defendant and Appellant.

C064412

(Super. Ct. No. 163993)

The trial court found defendants Doug Tirri and his former spouse, Joann Tirri, liable for fraud in failing to disclose to plaintiffs Roy and Jennifer George that the home they sold to them was not constructed with required permits and was defective. Only Mr. Tirri appeals from the judgment. He claims the trial court committed evidentiary errors, errors in awarding damages, and that it was biased. Plaintiffs request we impose sanctions for a frivolous appeal. We conclude none of defendant's arguments have merit and we affirm the judgment. We also deny plaintiffs' request for sanctions.

FACTS

This appeal is prosecuted on a settled statement written by the trial court. Plaintiffs purchased a home in Shasta County from defendants for \$180,000. Defendants disclosed to plaintiffs that the construction of a back porch was not done with permits. However, defendants did not disclose that the entire home was built without permits or that there were defects in the home's foundation.

After escrow had closed, plaintiffs learned from a county building inspector that the only permit issued for the site was for construction of a garage. The home was deemed uninhabitable, and plaintiffs and their children had to live in a travel trailer on the property and store their belongings while the home was reconstructed and brought up to code.

Plaintiffs filed a complaint for fraud and other causes of action against defendants and the real estate agency and agents who handled the sale. The realtor defendants settled for payment of \$1,800. Plaintiffs also received \$23,200 from their title insurance agency.

Following a court trial, the court found in favor of plaintiffs. It awarded plaintiffs \$180,000 in damages: \$72,000 in out-of-pocket damages and an additional \$108,000 in general damages.

Defendant contends the court erred by:

- (1) Admitting oral testimony by plaintiffs that contradicted their earlier responses to a request for admissions;
- (2) Admitting testimony of real property valuation from plaintiffs' expert witnesses who had not been adequately disclosed before trial, and from plaintiff Roy George;
- (3) Awarding damages under the wrong standards and without substantial evidence; and

(4) Harboring bias due to the fact that plaintiff Jennifer George is a Shasta County Superior Court employee.

DISCUSSION

I

Testimony that Contradicted Admissions

Defendant claims the trial court erred when it did not exclude portions of plaintiffs' testimony that contradicted earlier admissions. In response to a request for admissions, plaintiffs admitted defendants told them they had obtained a permit to construct only a garage, and that defendants told them they (defendants) knew at all times they had built the residence without obtaining any required permits.

At trial, however, plaintiffs testified they had no knowledge the residence was constructed without permits until a county inspector told them after they had purchased the property. Plaintiffs also testified defendants never disclosed to them that all of the work performed on the residence, except for construction of a porch, was done without permits. Defendant contends the trial court erred in admitting plaintiffs' testimony.

Defendant's argument, that the court erred in admitting testimony that contradicted earlier admissions, as a general legal matter is correct, but the record does not contain sufficient evidence on which we can determine the trial court actually erred. This point exposes the risks inherent when proceeding on a settled statement.

An admission made in response to a request for admission "is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission under [Code of Civil Procedure] Section 2033.300." (Code Civ. Pro., § 2033.410, subd. (a).)

The record includes plaintiffs' admissions, but it is silent regarding how they and the conflicting testimony were addressed in court. The record does not indicate whether defendants objected to the plaintiffs' contradictory testimony, or whether the court permitted plaintiffs to withdraw or amend their admissions. Because we must assume all

intendments necessary to affirm the judgment unless the short record contradicts them (*Dumas v. Stark* (1961) 56 Cal.2d 673, 674), we presume the court took whatever action was necessary to admit the testimony and we affirm the court's action on that basis.

When proceeding by means of a settled statement, the appellant bears the responsibility of ensuring the settled statement is a “condensed narrative of the oral proceedings *that the appellant believes necessary for the appeal.*” (Cal. Rules of Court, rule 8.137(b)(1), italics added.) Neither in his proposed settled statement, nor in his reply to plaintiffs' proposed statement, did defendant include any information of the proceedings surrounding admission of the contradictory testimony. Without such evidence, we are unable to review what transpired, and thus we must presume the court complied with the law and did not abuse its discretion admitting and relying upon plaintiffs' trial testimony.

II

Admission of Expert Witness Testimony

Defendant contends the trial court erred when it admitted valuation testimony from expert witnesses plaintiffs had not adequately disclosed, and from plaintiff George Tirri. We conclude the trial court did not abuse its discretion in admitting the testimony because it could conclude plaintiffs did not unreasonably fail to comply with the statutory disclosure requirements, and because Mr. Tirri could testify as a percipient witness as to value. Even if the trial court erred, however, the error was not prejudicial, as the court did not rely upon the expert testimony.

A. Additional background information

In response to defendant's demand to exchange expert witness information, plaintiffs' counsel forwarded a letter listing two witnesses she intended to call as percipient witnesses and could also call as expert witnesses: construction contractors Robert Sims and Mike Wheeler. Counsel indicated the two men would testify they

submitted bids and provided estimated costs for bringing the residence into compliance under all required permits.

Defendant objected to counsel's response. He asserted the letter did not comply with the statutory requirements governing responses to demands to exchange experts found at Code of Civil Procedure section 2034.260.

Plaintiffs' counsel then provided a second response, this one in the form of a pleading. In this response, counsel stated Sims and Wheeler would be called to testify as expert witnesses. Counsel provided the witnesses' addresses, phone numbers, and state contractors' license numbers. Counsel stated neither of the experts had prepared or provided written reports for purposes of their testimony. Neither had indicated they would charge a fee for their appearances. Both would testify to being familiar with the case, as both had submitted bids to plaintiffs for the cost of construction to bring the residence up to code. Both were licensed California contractors, each with more than 20 years of experience.

Defendant filed motions in limine to prevent plaintiffs' experts from testifying and to prevent any of plaintiffs' lay witnesses from providing expert opinion. Defendant argued the court was obligated to exclude the expert opinion offered by any witness because plaintiffs had failed to comply with the statutory expert witness disclosure requirements. (Code Civ. Proc., § 2034.300.)

The trial court denied both in limine motions. It ruled the motion to exclude expert witnesses was denied without prejudice.

Sims and Wheeler both testified at trial. However, the trial court determined their testimony was not material to its findings, and it did not include any description of their testimony in the settled statement.

Plaintiff Roy George also testified at trial. According to the settled statement, "Roy testified as to the damages he incurred through-out the ordeal."

Defendant claims the court erred in admitting the expert testimony of Sims and Wheeler, and Mr. George's testimony of damages, and that the errors were prejudicial.

B. *Analysis*

Code of Civil Procedure section 2034.300 directs a court to exclude from evidence the expert opinion of any witness offered by any party who "unreasonably" failed to comply with the expert witness disclosure requirements. We review a trial court's ruling on a motion to exclude an expert's opinion, as well as the trial court's reasonableness determination under Code of Civil Procedure section 2034.300, for abuse of discretion. (See *Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950.)

The trial court did not abuse its discretion in denying defendant's in limine motions. On this record, it could conclude plaintiffs did not unreasonably fail to comply with the disclosure requirements. Plaintiffs disclosed the names, addresses, and phone numbers of their proposed expert witnesses. Plaintiffs also explained no fee had yet to be demanded by the witnesses and the witnesses had no reports. This information substantially complied with the requirements of expert witness disclosure (Code Civ. Proc., §§ 2034.260, 2034.270), and the court could determine plaintiffs did not unreasonably fail to comply with those requirements.

Even if the court had erred, we still would not reverse on this point. Defendants suffered no prejudice by the court admitting the testimony. In the settled statement, the court stated it did not consider the experts' testimony in reaching its judgment. Thus, defendants cannot show they would have received a more favorable judgment had the court not admitted the testimony, the showing of prejudice required to reverse on an evidentiary decision. (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1038-1040.)

Also, the court did not err by admitting plaintiff Roy George's testimony on damages. As explained below, Mr. George was certainly able to testify, as a percipient witness and as to the issue of value, on the costs he incurred in restoring the residence.

III

Errors in Damage Award

The trial court awarded plaintiffs \$180,000 in damages, calculated as follows: \$72,000 in actual damages (the difference between what plaintiffs paid for the home (\$180,000) and the value of what they received); plus \$108,000 in general damages. The court found plaintiffs were entitled to an award of \$216,000 in general damages, but it honored plaintiffs' request to reduce that amount to \$108,000.

Defendant claims the court committed numerous errors in reaching its damage award:

- (1) The court used the wrong standard of damages.
- (2) No substantial evidence supports the award as plaintiffs presented no expert testimony on the value of the property;
- (3) General damages are not allowed for fraudulent real property transactions;
- (4) If the court awarded tort damages under Civil Code section 3333 instead of damages for fraud under Civil Code section 3343, it failed to account for plaintiffs' contributions to their damages; and
- (5) The court failed to deduct from the damage award the amounts plaintiffs received from the defendant real estate agents in settlement and from plaintiffs' title insurance company.

We address, and reject, each contention.

A. *Standard of damages*

Defendant claims the court used the wrong standard of damages. He asserts the court was required to apply the out-of-pocket standard of damages provided in Civil Code section 3343 to determine the damage award. He claims the court instead awarded plaintiffs their costs in refurbishing the property.

Defendant correctly claims damages for fraud in real property transactions are governed by Civil Code section 3343. However, contrary to defendant's assertion, the trial court in fact calculated damages according to Civil Code section 3343.

Civil Code section 3343, subdivision (a), describes the out-of-pocket standard as follows: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received"

This is the very standard the court applied here. The court wrote: "The Court **FINDS** the difference between the actual value of that which the Plaintiffs parted and the value of what was received to be the amount requested by Plaintiffs: \$72,000." The court thus applied the correct standard.¹ (Original capitalization & boldface type.)

That this amount of out-of-pocket damages may have equaled plaintiffs' costs, as contended by defendant, is irrelevant. Without a reporter's transcript, we assume sufficient facts exist on which the court could make this award.

B. *Evidence of value*

Defendant claims fraud damages under Civil Code section 3343 require evidence of value presented by expert testimony, not evidence of the cost of repair. He claims plaintiffs' lack of expert testimony on the issue of value is fatal to their recovery.

Defendant is incorrect. The market value of real property may be established by the testimony of either the owner of the property or an expert witness. (Evid. Code, § 813.) A buyer may testify regarding value without qualifying as an expert. (*Buist v. C. Dudley DeVelbiss Corp.* (1960) 182 Cal.App.2d 325, 334.)

¹ This finding eliminates the need to discuss defendant's assertion that if the court awarded damages under Civil Code section 3333, the general tort damages statute, it had to consider defendant's contributory negligence. The court did not award damages under section 3333.

In addition, the cost of repairs caused by misrepresentations about the property's condition, although not an element of recoverable damages, may be introduced to show the property's actual value. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 148.)

In the settled statement, the court stated plaintiff Roy George testified "as to the damages he incurred through-out the ordeal." We presume the court in part meant Mr. George testified as to the costs he incurred in rehabilitating the property, as also shown on a listing of expenses prepared by plaintiffs, and the court relied upon that evidence to establish the property's value in order to calculate damages.

The court had additional evidence of value before it. Defendants introduced the appraisal prepared when plaintiffs purchased the property. That appraisal valued the property at \$200,000, without accounting for the permitting and structural defects discovered later. Without a reporter's transcript to augment this testimony, we presume sufficient evidence exists in the record to support the court's determination of \$72,000 as the difference between the amount plaintiffs paid for the property and the property's true value.²

C. *Award of general damages*

Defendant faults the court for awarding general damages for personal injuries. The record does not indicate general damages were awarded for personal injuries. However, Civil Code section 3343 allows the court to award additional damages along with the out-of-pocket fraud damages. The statute entitles the fraud victim to his out-of-pocket loss "together with any additional damage arising from the particular transaction,"

² The \$200,000 value was based on a comparable sales approach. The appraiser also attempted to value the property based on a cost approach. Although he claimed the property's value under this approach was \$239,000, a figure cited by the trial court in the settled statement, he also stated there was insufficient data to support this approach, and he gave it no consideration in his final analysis.

including an amount “which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.” (Civ. Code, § 3343, subd. (a)(2).)

According to the settled statement, there was evidence plaintiffs suffered loss-of-use damages due to defendant’s misrepresentations and omissions. The residence was uninhabitable. Thus, plaintiffs were not allowed to live in it until it was brought up to code and permitted legally. As a result, they had to live in a travel trailer on the property and store their belongings at a cost. Without a reporter’s transcript, we are left to presume the award of general damages was based on plaintiffs’ loss of use of the property. This award was consistent with the standard of damages allowed by Civil Code section 3343.

D. *Offset for settlement amounts*

Defendant argues the court was required to offset the damages award with the amount of money plaintiffs received in a settlement with the realtor defendants and in a payment from the title insurance company, amounts totaling \$25,000. A release or dismissal given in good faith by one joint tortfeasor reduces the claims against the nonsettling tortfeasors in the amount of the settlement paid. (Code Civ. Proc., § 877, subd. (a).)

Here, the trial court determined plaintiffs were entitled to an award of \$72,000 in fraud damages and \$216,000 in general damages. Plaintiffs, however, requested general damages be reduced in half to \$108,000. This reduction satisfied the requirements of Code of Civil Procedure section 877, as it included the offset of \$25,000 plaintiffs received in settlement, and then some.

At oral argument, counsel for defendant asserted there was no offset because the court did not first find plaintiffs were entitled to \$216,000 in general damages. He claims the court found only that plaintiffs were entitled to the \$108,000 in general damages it actually awarded, and it took no offset from that amount.

Counsel is incorrect. In its statement of decision, the trial court stated: “The Court **FINDS** that the Plaintiffs have established that they are entitled to general damages in the sum of \$216,000; however, Plaintiffs have specifically requested a reduced sum. Accordingly, and at the specific request of the Plaintiffs, the Court awards the sum of \$108,000 as and for general damages.” (Original capitalization & boldface type.)

Clearly, the court offset its finding of damages by an amount that included any offset to which defendant was entitled under Code of Civil Procedure section 877.

IV

Bias Due to Plaintiff's Employment by Court

Defendant accuses the trial court of bias based on the fact plaintiff Jennifer George is an employee of the Shasta County Superior Court. He claims that when he raised this issue with the court, the court “simply brushed it off, ignoring [his] concerns.” Not true.

Defendant first raised the issue in his settlement conference statement. At that time, however, he made no objection nor sought any relief based on plaintiff's employment status. He wrote: “Defendants have concern in this regard, but simply ask that [plaintiff] have no involvement in the administrative handling of this case, and that her only involvement be as a party.” By this remark, defendant forfeited any objection he may have had based on plaintiff's employment. And, in fact, the record discloses no further objection by defendant throughout the trial. His forfeiture of the issue before the trial court forfeits it on appeal. (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501.)

In any event, the issue next surfaced after trial and entry of judgment. At a hearing on a motion by plaintiffs for prejudgment interest, defense counsel informed the court of plaintiff's employment status and asked the court if a disclosure had been made. According to the court's minutes, the court advised counsel “that it is unaware if Jennifer George is a Court employee or not AND DOES NOT KNOW A Jennifer George outside of their lawsuit.” (Original capitalization.) By this remark, the court did not “brush off”

defendant. It simply and directly answered defendant's question and his underlying concern of bias. There was no bias.

V

Request for Sanctions

Plaintiffs claim this appeal is frivolous and ask us to impose sanctions against defendant and his attorney. While this appeal comes close to being frivolous, we cannot conclude "any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) We deny the request.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to plaintiffs. (Cal. Rules of Court, rule 8.278(a).) Plaintiffs' request for sanctions is denied.

NICHOLSON, Acting P. J.

We concur:

BUTZ, J.

MAURO, J.