Filed 1/12/15 Haena v. Martin CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

BRIAN HAENA et al., Plaintiffs and Respondents, v. CHAD MARTIN, Defendant and Appellant.	C066180 (Super. Ct. No. 34200800014849CUBCGDS)

Defendant Chad Martin, a real estate broker, entered into a series of transactions involving promissory notes with plaintiffs Brian Haena, Karen Haena, Bernard Haena, Sonia Haena, Murray White, and Joanne White. In the aftermath of fallout from the transactions, plaintiffs filed suit against Martin, alleging various unlawful acts, including violation of Business and Professions Code section 17200, fraud, misrepresentation, and negligence.[1] Following a court trial, the court found for plaintiffs and awarded a variety

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

of damages. Martin appeals, arguing (1) the trial judge should have recused himself, (2) the court erred in awarding damages, and (3) no violation of section 17200 occurred. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Martin, a licensed real estate broker, became acquainted with Brian Haena in the late 1990's.[2] Brian referred several potential real estate clients to Martin and in 2002 referred Murray and Joanne White to Martin. Martin acted as the Whites' agent in their purchase of a home.

Martin in 2005 or 2006 discussed with Brian Haena and his wife Karen the prospect of investing $100,000 in a promissory note secured by a deed of trust on a residence. The Haenas borrowed $100,000 and invested in the note, which paid a higher interest rate than the financing loan supporting it. When the principal on the note was paid off, Martin retained the proceeds in his brokerage account for reinvestment in a future project.

The Haenas, with Martin's assistance, invested in a 60-acre development. The investment consisted of a promissory note (the Smith Note) secured by a deed of trust on real property. The Whites also invested in the Smith Note. Both couples received interest payments on the note and recouped their investments. Martin again kept the Haenas' and Whites' principal funds from the Smith Note in his brokerage account.

The Svensek Note

In 2007 Martin told Brian that Martin was part owner of the "Svensek Note" and that one of the other investors wanted to sell his $25,000 interest in the note. According to Martin, the Svensek Note arose from a $408,000 loan he made to a man named

---

[2] For clarity and because they share surnames, plaintiffs will sometimes be referred to by their given names. No disrespect is intended.

Svensek. The loan was to finance the development of 12 townhouses. Brian stated that his parents, Bernard and Sonia Haena, might be interested.

Martin stated the Svensek Note was secured by a deed of trust on 12 parcels being developed as townhouses. Four of the townhouses were almost finished and the note had second priority position. Bernard and Sonia invested $25,000 by purchasing the third parties' interest in the note.

In June 2007 Martin sent the Haenas and the Whites several e-mails regarding the investment. In one e-mail Martin stated: "I have quite a few notes secured by real estate in the greater Sacramento area which have been earning me an interest return of 10% or better. Though I hate to give up the security, I do need to look at this as an opportunity to introduce you all to the availability for great returns out there. Since our banks pay us about 2% on our money, this should be a 'no brainer.'. . .

"I am looking for investors who are willing to invest $10,000 to $75,000. In most cases, you would invest with me, not just through me. This is a way to watch your money build, and know that I'm right there with you on the deal."

In another e-mail, to Murray, Martin explained the project secured by the Svensek Note: "$408,000 2nd position against 6244 Filbert Avenue, Orangevale. We are behind a first of approx. $330K. 12 townhomes to be built, 4 are nearly completed, and the next 4 should be under construction soon. This loan may be rewritten to allow for additional construction expenses, but only once we are placed into first position overall. The first 4 units have been contracted for sale and are expected to close for $385K each. Upon completion of these 4 townhomes, we want to continue our 2 year + venture with Frank Svensek (borrower) to see all homes built and sold. Our return upon each closing will increase as the inventory and value in the property is lessened. . . . [¶] . . . [¶]

". . . I will still consider managing each loan, depending on the buy-out arrangements, which will allow for any and all payments to be filtered through my office. Monthly invoices and statements as well as annual tax forms will be handled through my office as well. Any legal complications shall be addressed by us, so you as the investor won[']t have to deal with such items."

Finally, Martin e-mailed Murray that "The townhomes in Orangevale have been solid for me, and could become an even more profitable project very soon. . . . I think the return is solid, and the borrowers have been solid for the past couple of years."

Subsequently, Brian authorized Martin to "roll my $100,000 into the townhome deal that you have at 12%." Brian also told Martin that Murray wanted to invest. Martin transferred $243,000 to himself—$100,000 from Brian and Karen, and $143,000 from the Whites—in return for interests in the Svensek Note. Martin also told the Whites, Brian, and Karen that he would be forwarding service agreements to them, under which he would undertake certain obligations regarding the servicing of the loan in return for 2 percent of the payments.

Four months after plaintiffs invested in the Svensek Note, the first lienholder foreclosed on its deed of trust on the complex. After the foreclosure, plaintiffs discovered Martin no longer had any stake in the Svensek Note, having sold his interest to plaintiffs. The Svensek Note secured the construction and sale of eight townhomes, not twelve. In 2006 Martin had reconveyed his interest in the four developed townhomes to Svensek, allowing the developer to obtain another construction loan.

At the time plaintiffs invested in the Svensek Note, the developer was already in arrears on his note securing the senior lien against the property. Although Martin, in an e-mail, stated the first secured lien was for $330,000, the original lien amount was for $265,000. The $330,000 amount included Svensek's default, interest, and penalties. Nor did Martin inform plaintiffs that Svensek was a licensed house painter with no experience in property development.

A notice of default was prepared and signed on January 15, 2008, when Svensek ceased making his payments. However, Martin did not record the notice until March 20, 2008. Prior to the recording, the senior lienholder recorded a notice of default and foreclosed on the property. No one bid at the June 6, 2008, trustee's sale, and the property reverted to the senior lienholder, extinguishing plaintiffs' interests in the Svensek Note.

Subsequent Litigation

Plaintiffs filed suit against Martin and Svensek.[3] The suit alleged causes of action for breach of contract, fraud based on intentional misrepresentation, fraud based on negligent misrepresentation, constructive fraud, fraud based on concealment, breach of fiduciary duty, violations of section 17200, and negligence. A court trial followed.

The court found in favor of plaintiffs and issued a statement of decision. Concluding the elements of fraudulent misrepresentation were met, the court found that defendant's statements regarding the facts surrounding the Svensek loan "were meticulously constructed to present an enticing but highly inaccurate picture of the status of the loan in which Martin had invested, the status of the senior loan, and the extent and nature of the security"; that this was done in order to induce plaintiffs to buy out Martin and to assume the role of Svensek's lender in place of Martin; and that Martin's communications were carefully crafted to present the impression he was selling only part of his investment in the Svensek loan, creating the illusion he was "staying in the deal," when in fact he was " 'selling out.' " The court further found Martin did not inform plaintiffs that he had twice previously extended the deadline for Svensek's balloon payment under the note and misrepresented that the four completed lots were included in the property securing the note. The court found Brian and Karen's and the Whites' reliance on Martin's representations was reasonable. In addition, the court found plaintiffs met their burden of proof on the causes of action for concealment and negligent misrepresentation.

---

[3] Ultimately, a default judgment was entered against Svensek.

As for the causes of action for breach of fiduciary duty and constructive fraud, the trial court concluded that "as of the dates of the communications accompanying the sale of the Svensek Note, defendant was acting as an agent for [Brian and Karen] and [the] Whites in relation to the Smith Note. In each instance defendant was holding funds derived from his administration of this loan under the terms of written 'Investor Service Agreements' prepared by defendant. Those agreements authorized defendant-- in his capacity as a Broker-- to act on plaintiffs['] behalf in a variety of ways, including all acts deemed necessary to the collection and servicing of the loans. Defendant advised plaintiffs with respect to these loans and held the funds on plaintiffs' behalf. As to these activities, he plainly acted in an agency, and hence fiduciary, capacity."

The court concluded that, at all times, the parties anticipated that Martin would continue as their agent, interacting with Svensek, and collecting and holding funds on their behalf. This, the court determined, "was an integral component of the investments" that Martin was soliciting. Martin also took a 2 percent loan servicing fee as compensation for servicing the loan under the " 'Independent Servicing Agreement.' "

The court acknowledged that being a licensed real estate agent does not in itself give rise to a fiduciary duty. Rather, "The fundamental question is whether a real estate broker, who is indisputably acting as the agent for a principal in connection with a first transaction, and who then utilizes his knowledge of the real estate market to entice his principal into a further investment as to which the broker will thereafter continue to act as the agent of the principal, is freed of his fiduciary responsibility during that intermediate segment of the transaction that consists of replacing the first investment with one theretofore owned by the broker. The answer is necessarily 'no.' " Given the facts surrounding the Svensek Note, the law imposed upon Martin all of the obligations of a fiduciary to the Whites and to Brian and Karen. However, this fiduciary relationship did not exist between Martin and Bernard and Sonia.

As for the cause of action for negligence, trial testimony established that Martin's affirmative representations and knowing omissions fell below the standard of care and were a cause in fact and proximate cause of plaintiffs' losses.

Finally, given the court's findings on plaintiffs' causes of action for fraudulent misrepresentation and concealment, plaintiffs had established a violation of section 17200. The court rejected Martin's claim that any fraudulent conduct was " 'personal' " and not a " 'business' " practice. The court again referenced the "Investor Service Agreements" prepared by Martin, which authorized him to act on plaintiffs' behalf in the collection and servicing of the loans. The court noted: "The investment in the Svensek Note was the next step in defendant[']s business, which as he openly acknowledged, involved placing clients in 'secure, positive cash flow investments.'. . . Many of the communications included defendant's business in the signatory block, indeed the individuals who received the solicitations did so because they were included in the 'Chad's Business' email folder. The evidence thus established that the events adjudicated here were part of defendant's ongoing business activities."

The court awarded Brian and Karen and the Whites benefit-of-the-bargain damages for their intentional misrepresentation, concealment, and constructive fraud claims. Brian and Karen were entitled to recover $106,000 and the Whites $151,580. Bernard and Sonia were entitled to recover only their "out-of-pocket," or actual, expenses. Brian and Karen and the Whites were also entitled to recover their principal investment amounts under the "out-of-pocket" damages standard for their negligent misrepresentation and negligence claims. Brian and Karen and the Whites were entitled to recover their principal investment as restitution damages for the violation of section 17200. Since the damage awards were duplicative, the total amount of damages that each respondent may collect is "$106,000 for [Brian and Karen], $151,580 for the Whites and $25,000 for Bernard and Sonia Haena."

Following entry of judgment, Martin filed a notice of appeal.

DISCUSSION

1. Judicial Recusal

Martin contends the trial court judge, Judge Kevin R. Culhane, should have recused himself. According to Martin, Judge Culhane did not accurately describe his involvement in a prior case against Martin's father. When the facts are undisputed, we review a trial court's decision not to recuse himself or herself to determine whether a reasonable member of the public at large would fairly entertain doubts concerning the judge's impartiality so as to require disqualification. This presents a question of law for our independent review. (*Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, 319.)

Martin claims that after hearing testimony which revealed the identity of Martin's father, Tom Martin, Judge Culhane disclosed that a firm he was formerly associated with had been involved in a lawsuit with the elder Martin. Judge Culhane stated he did not try the case, did not take any depositions, and did not know Tom Martin's status in the case. Martin argues Judge Culhane was not entirely forthcoming about his involvement in the case, since Judge Culhane "authored and signed the Complaint against Martin's father." Plaintiffs concede that Judge Culhane signed the 2007 complaint.

We cannot find that Judge Culhane's signing of a complaint involving Martin's father years before the current litigation would cause a reasonable person to entertain doubts about the judge's impartiality. During the trial, Judge Culhane described his involvement in the previous case as minimal. Nothing in Martin's argument leads us to question Judge Culhane's version of events or find he erred in not recusing himself. The previous case involved Martin's father, not Martin. Nor does Martin point to any instances during trial illustrative of Judge Culhane's alleged bias based on the preceding case. While the objective standard of determining whether a judge should recuse himself or herself indicates that the decision should not be based on the judge's personal view of his or her own impartiality, nor should it be based on the litigant's necessarily partisan views of a lack of impartiality. (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104.) We find no error.

Plaintiffs filed a motion for sanctions on appeal, asserting that the recusal claim is totally frivolous. While the contention is without merit, we decline to find that it is totally frivolous. Accordingly, the motion is denied.

2. Measure of Damages for Fraud, Negligence, and Negligent Misrepresentation

Martin challenges the trial court's award of damages. He contends the court's award of benefit-of-the-bargain damages to the fraud claims was error, arguing no agency relationship existed between him and Brian, Karen, and the Whites when they invested in the Svensek Note. He also argues the court erred in awarding Bernard and Sonia the amount of their investment without proof of the market value of the Svensek Note.

A. Benefit-of-the-Bargain Damages to Brian, Karen, and the Whites

The trial court found Martin acted as Brian, Karen, and the Whites' agent in securing their funding for the Svensek Note. Therefore, Martin owed them a fiduciary duty. Accordingly, the two couples could recover benefit-of-the-bargain damages on the causes of action for breach of fiduciary duty and constructive fraud. Constructive fraud requires proof that the defendant engaged in a breach of duty by which he, without fraudulent intent, gained an advantage over a person by misleading another to his or her prejudice. (Civ. Code, § 1573.) Constructive fraud requires the demonstration of a fiduciary or confidential relationship. (*Horiike v. Coldwell Banker Residential Brokerage Co.* (2014) 225 Cal.App.4th 427, 436.)

Martin disputes the existence of any such confidential or fiduciary relationship. Martin claims he could not have served as the two couples' agent in connection with the Svensek Note because he was not representing them in dealing with a third party. Instead, Martin was selling them his asset and no fiduciary relationship was created. Martin argues the court found the agency relationship based on his actions in connection with the Smith loan, and that this agency relationship ceased prior to his actions in connection with the Svensek Note. According to Martin, "the *sole* basis for the Court's conclusion that Martin was their agent for the Svensek Note was the fact that Martin was their agent on the earlier Smith Note. [Citation.] Thus, the proper focus on review of the Court's determination is whether that fact supports a finding of agency." Martin misreads the court's decision.

The court noted Martin began his fiduciary relationship with the negotiations over the Smith Note. Martin continued as fiduciary to the couples during the negotiations over the Svensek Note. In regard to both notes, Martin held funds derived from his administration of the loans under the terms of written "Investor Service Agreements." Martin prepared these agreements, which authorized him to act on the two couples' behalf in all acts necessary to the collection and servicing of the loans; he also held the funds on their behalf. As for Martin's assertion that he was selling only his own asset, the court noted Martin acknowledged that in recommending the Svensek investment, he was engaged in the process of investing Brian and Karen's and the Whites' money for them.

Far from simply basing its finding of a fiduciary or confidential duty on Martin's actions in connection with the Smith Note, the court spelled out the fiduciary relationship between the parties that began with the Smith Note and continued in connection with the Svensek Note. The record supports the court's findings.

Martin contends that even if he was a fiduciary, benefit of the bargain is an improper measure of damages; instead, a party injured by the acts of a fiduciary may only recover out-of-pocket damages. Therefore, the court erred in awarding benefit-of-the-bargain damages to Brian, Karen, and the Whites.

Out-of-pocket damages restore a plaintiff to the financial position the plaintiff enjoyed prior to the fraudulent transaction, awarding the difference in actual value between what the plaintiff gave and what was ultimately received. A benefit-of-the-bargain damage award places a defrauded plaintiff in the position the plaintiff would have enjoyed had the false representation been true, awarding the difference between what the plaintiff actually received and what he or she was fraudulently led to believe he or she would receive. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 (*Alliance Mortgage*).)

Civil Code section 3333 sets forth the general measure of damages for tort claims: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Under Civil Code section 1709, "[o]ne who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damages which he thereby suffers."

Fraud claims involving property transactions are governed by Civil Code section 3343, which limits fraud victims to the recovery of out-of-pocket damages, except those who have been defrauded by a fiduciary. Under this scenario, the " 'broader' measure of damages provided by [Civil Code] sections 1709 and 3333 applies." (*Alliance Mortgage*, *supra*, 10 Cal.4th at pp. 1240-1241, fns. omitted.) In *Alliance Mortgage*, the Supreme Court determined that the remedy for negligent misrepresentation by a fiduciary is out-of-pocket losses. However, the court declined to conclusively resolve whether out-of-pocket or benefit-of-the-bargain damages should apply in cases involving intentional fraud by a fiduciary. (*Id.* at pp. 1249-1250; *Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 237 (*Fragale*); *Hensley v. McSweeney* (2001) 90 Cal.App.4th 1081, 1085 (*Hensley*).)

Subsequently, appellate courts have found a plaintiff may recover benefit-of-the-bargain damages for intentional fraud by a fiduciary. In *Fragale*, the court determined "[t]he benefit-of-the-bargain measure places a defrauded plaintiff in the position he would have enjoyed had the false representation been true, awarding him the difference in value between what he actually received and what he was fraudulently led to believe he would receive." (*Fragale*, *supra*, 110 Cal.App.4th at p. 236.) In determining that benefit-of-the-bargain damages apply in intentional fraud claims involving a fiduciary, the *Fragale* court stated: " 'the remedy afforded by [Civil Code] sections 1709 and 3333 aims at compensation for any and all the detriment proximately caused by the breach.' " (*Fragale*, at p. 238.) In *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555 (*Salahutdin*), the court awarded benefit-of-the-bargain damages against a fiduciary in a real estate fraud action. The court found awarding benefit-of-the-bargain damages under Civil Code sections 1709 and 3333 was based on the " ' "determination that *the faithless fiduciary shall make good the full amount of the loss of which his breach of faith is a cause.*" ' [Citation.]" (*Salahutdin*, at p. 567.)

Conversely, in *Hensley*, *supra*, 90 Cal.App.4th 1081, the court awarded out-of-pocket damages in a case involving claims of fraud and intentional misrepresentation. (*Id*. at p. 1086.) The *Hensley* court did not discuss the issue of separating fraud damages based on intentional misrepresentation from those based on negligent misrepresentation. Instead, the court adopted the reasoning of its earlier decision in *Overgaard v. Johnson* (1977) 68 Cal.App.3d 821, which found the measure of damages for fraud by a fiduciary is out-of-pocket damages, not the benefit-of-the-bargain damages normally applicable to contract causes of action. (*Id*. at pp. 826-828.) *Hensley* acknowledged a split of authority among appellate courts with respect to the measure of damages for intentional fraud by a fiduciary, but "[i]n the absence of any contrary authority from the California Supreme Court, we decline to depart from our long-standing decision in *Overgaard* . . . ." (*Hensley*, *supra*, 90 Cal.App.4th at p. 1086.)

Not surprisingly, Martin asks us to cleave to the decision in *Hensley* and reject the trial court's award of benefit-of-the-bargain damages for intentional fraud by a fiduciary. However, we find the reasoning of *Salahutdin* and *Fragale* more persuasive. Under Civil Code section 1709, a defendant who willfully deceives a plaintiff with the intent to induce him to alter his position to his injury "is liable for any damages which he thereby suffers." Civil Code section 3333 specifies compensation for "all the detriment proximately caused thereby, whether it could have been anticipated or not." Read together, these two statutes support application of the broader measure of benefit-of-the-bargain damages to claims of intentional fraud by a fiduciary. As one commentator has noted, these two statutes support imposing benefit-of-the-bargain damages " 'because a fiduciary should be responsible to compensate his or her principal for the full amount of the loss caused by his or her breach of duty.' " (*Fragale*, *supra*, 110 Cal.App.4th at pp. 238-239, quoting 2 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 3.33, pp. 190-191, fns. omitted.) We agree with this approach and conclude the measure of damages in a case of intentional misrepresentation by a fiduciary is not limited to out-of-pocket losses. Therefore, the court did not err in awarding benefit-of-the-bargain damages.

B Out-of-Pocket Damages to Bernard and Sonia

The trial court found Martin was not in a fiduciary relationship with Bernard and Sonia, so benefit-of-the-bargain damages could not be awarded. Instead, the court awarded the couple their out-of-pocket damages in the amount of $25,000, their investment in the Svensek Note. However, Martin contends the court could not award such damages since no evidence was submitted as to the value of the Svensek Note.

Civil Code section 3343 states that a person 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 was received. To determine this amount, the court must calculate the " 'difference in actual value at the time of the transaction between what the plaintiff gave and what he received.' " (*Alliance Mortgage*, *supra*, 10 Cal.4th at p. 1240.)

A promissory note is a negotiable instrument that brings with it an unconditional promise to pay a fixed amount of money. (Com. Code, § 3104, subds. (a), (e).) As Martin concedes, a promissory note is not real property for the purposes of calculating value. (Civ. Code, § 658.)

Martin contends there was no evidence that the Svensek Note had no value, and the court's award of Bernard and Sonia's $25,000 investment in the note was error. The undisputed facts reveal that Bernard and Sonia invested $25,000 in the Svensek Note. After Svensek failed to make payments on the note, the senior lienholder recorded a notice of default. Following a trustee sale, the property reverted to the senior lienholder, which extinguished the interests of all other parties.

Martin argues: "Even if Svensek was insolvent – meaning, unable to meet the obligations of the Note – does not mean he did not have *any* assets against which the Note could be enforced. To prove that the Svensek Note had absolutely no value, [Plaintiffs] needed to prove not merely that Svensek was insolvent, but that he had absolutely no assets against which the Note could be enforced. There is no such evidence in the record." What Martin overlooks is that the court found the Svensek Note project "failed, and a foreclosure by a senior lien holder eliminated the security of plaintiffs' deed of trust. The borrower's default has been taken in this litigation." The court further found "plaintiffs have been unsuccessful in obtaining any form of repayment from the borrower Svensek, whose default has been taken in this case." The lack of success in obtaining payment supports the court's determination that future efforts to secure payment would be unavailing and that the note was without value. Plaintiffs may dispute the quality of the evidence presented but cannot dispute the existence of substantial evidence sufficient to sustain the court's determination on appeal.

3. Section 17200

Finally, Martin challenges the court's finding in favor of plaintiffs on the section 17200 claim. Martin argues, as a matter of law, his sale of his interest in the Svensek Note was not a "business" act.

To state a claim under section 17200, a plaintiff must allege facts demonstrating that a particular practice by the defendant violated a specific underlying law. (*Cal-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) In addition, the plaintiff must allege a financial or property loss as a result of the unlawful acts. (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 522.) Section 17200 defines "unfair competition" as any "unlawful, unfair or fraudulent business act or practice" and encompasses " 'anything that can properly be called a business practice and that at the same time is forbidden by law' " (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 113 (*Barquis*)). No uniform definition of "business practice" exists. Instead, each determination is a question of fact dependent on the circumstances of each case, which we determine de novo. (*People v. E.W.A.P., Inc.* (1980) 106 Cal.App.3d 315, 320-321.)

Martin contends that in finding a violation under section 17200, the court relied in part on the fact that Martin is a real estate broker. To the contrary, Martin asserts, under section 10131, his sale of his interest in the Svensek Note could not have been a business act as a real estate broker. Instead, Martin was acting on his own behalf in selling his interest in the note.

Martin cites *Horning v. Shilberg* (2005) 130 Cal.App.4th 197 (*Horning*), in which the court stated: "[A] person acts as a broker only if he or she is acting (1) for compensation and (2) on behalf of someone else." (*Id.* at p. 204.) In *Horning*, a real estate broker represented himself in purchasing real estate and subsequently sued the seller for damages, including his own broker's commission. The appellate court found the broker's own commission not recoverable, stating, "[w]here a broker agrees to purchase property on his or her own behalf, there is no agency or employment relationship." (*Ibid*.) Under those circumstances, the court defined a real estate broker as one " 'who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do [certain specified] acts for another or others.' " (*Id.* at p. 203.) The court concluded that a person acting on his or her own behalf in a real estate transaction "is not a broker within the meaning of Business and Professions Code section 10131." (*Id.* at p. 204.)

The facts before us bear no relation to the circumstances in *Horning.* Martin convinced plaintiffs to purchase a note he had an interest in, not real estate he collected a commission on. Though he had earlier served as a real estate agent for some of the plaintiffs, he solicited each of the plaintiffs to invest in a series of promissory notes, culminating in the ill-fated Svensek Note.

Martin also argues the trial court erred as a matter of law in finding that his actions constituted business acts under section 17200, citing section 10131.1. Section 10131.1, subdivision (b)(1)(B) states that a real estate broker can be considered in the business of selling promissory notes secured directly or collaterally by liens on real property only if the broker makes eight such sales in a calendar year. Since there is no evidence he engaged in these activities eight times, Martin claims he could not be found liable under section 17200.

However, unfair competition in the context of section 17200 refers to " 'anything that can properly be called a business practice and that at the same time is forbidden by law.' " (*Barquis*, *supra*, 7 Cal.3d at p. 113.) Section 17200 was designed to protect against conduct likely to deceive the consumer and to "enjoin on-going wrongful business conduct in whatever context such activity might occur." (*Barquis*, at p. 111.)

Here, Martin seeks to limit section 17200 to violations of section 10131.1. However, section 17200 does not require that the defendant hold any given license as a prerequisite to liability; it only requires that the defendant engage in an unlawful, unfair, or fraudulent act or practice. In addition, such a limitation flies in the face of the broad construction courts have given section 17200 and subverts the purpose of the statute: to protect consumers against unfair business practices. Martin, referring to his expertise as a real estate broker, solicited plaintiffs' investment in promissory notes. He encouraged them to invest in notes he knew were problematic at best. Based on their past experience with Martin, plaintiffs relied on his false representations to their financial detriment. The court did not err in finding violations of section 17200.

DISPOSITION

The judgment is affirmed. Plaintiffs shall recover costs on appeal.

RAYE, P. J.

We concur:

NICHOLSON, J.

ROBIE, J.