

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

STEVEN WEINER,

Plaintiff and Appellant,

v.

CENTEX HOMES,

Defendant and Respondent.

D067436

(Super. Ct. No. INC10003927 )

APPEAL from a judgment of the Superior Court of Riverside County, John G. Evans, Judge. Affirmed.

Bohm Matsen and Daniel R. Wildish; Bohm Wildish, Daniel R. Wildish and Scott A. Newman, for Plaintiff and Appellant.

Bryan Cave, Stuart W. Price, Brendon K. Barton, Douglas E. Winter and Angela Buenaventura, for Defendant and Respondent.

Steven Weiner purchased two condominium units from Centex Homes. After unsuccessfully attempting to refinance the properties less than one year later, Weiner sold the properties at a loss. He then sued Centex, claiming Centex was responsible for the

properties' reduced value and his related lost income. Weiner asserted various causes of action, including fraudulent inducement and negligent misrepresentation. Centex successfully moved for summary judgment. Weiner appeals. We affirm.

#### FACTUAL AND PROCEDURAL SUMMARY

We summarize the facts in the light most favorable to Weiner, the party opposing the summary judgment motion. (See *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 877.)

#### *Background*

In the mid-2000's, Centex built a common interest development composed of 280 residential units, known as Legacy Villas, near the La Quinta Resort in La Quinta, California. Before selling the residences, Centex entered into an agreement with the Resort's operating agent to allow interested residential owners to contract for rental management services and to allow renters to use Resort amenities (Resort management program).

In June and July 2007, Weiner signed purchase agreements (Agreements) to buy two Legacy Villas residential units from Centex. The Agreements contained a provision (initialed by Weiner) stating that Weiner was "NOT" purchasing the properties "AS AN INVESTMENT," and no representations were made regarding the amount or nature of rental income or appreciation that would be obtained from the properties. The Agreements also provided that Weiner has not relied on any oral statements or promises regarding any aspect of the property, including "the investment, appreciation or rental potential of ownership of the Unit" and/or any "recreational amenities."

The Agreements also stated: "Buyer acknowledges that the sale and purchase of the Unit is not contingent upon Buyer's ability to obtain financing of the Purchase Price. Buyer expressly acknowledges and agrees that Seller has made no representation or warranty to Buyer, express or implied, as to the availability of financing or Buyer's ability to qualify for such financing; and Seller has no responsibility to provide or otherwise participate in the procurement of such financing. . . . [¶] . . . In the event that Buyer elects to obtain a first trust deed loan to fund all or a portion of the Purchase Price, the terms and conditions of the loan will be a matter of concern solely between Buyer and the Buyer's lender and shall not in any way affect the rights or obligations of the parties to this Agreement."

Weiner also signed various disclosure documents. One of the documents stated the Resort management program is independent of Centex, and "is not promoted or offered by [Centex] and is not required to be entered into by Buyer. The decision to enter into a rental management agreement with the [Resort] (or with any rental management company) shall be made by Buyer based upon Buyer's evaluation and determination of his or her own circumstances and is completely independent from the decision to purchase one or more Units from Seller."

The signed disclosure documents also informed Weiner that various Legacy Villa owners were asserting legal claims against Centex, including "misrepresentations by [Centex] and certain of its prior sales agents . . . relative to the completion and operation of certain [amenities] and the terms and conditions of the Resort [management program] . . . ." The disclosure documents also stated: "No sales representative, employee or agent

has the authority to make any representation to Buyer which contradicts or modifies the matters and information set forth in this Disclosure Statement, the [Agreement] or any other written disclosure provided by Seller in connection with the Project . . . ."

Despite the provisions in the Agreements and disclosure documents, Centex's sales agent, Donald Summers, made various oral (and/or implied) representations to Weiner about the Resort management program, development amenities, projected rental income, and availability of conventional financing, and Weiner relied on these representations.

During the escrow period, Weiner obtained secured conventional loans from Wells Fargo Bank (Wells Fargo) to purchase the properties. Escrow closed on Weiner's two units in August and September 2007. At about this same time, Weiner placed his units into the Resort management program. According to Weiner, both units thereafter "had all the amenities available to a guest staying at the [Resort], including direct phone lines to the management desk at [the resort], maid service, and key card access."

About seven months after escrow closed, in April 2008, Weiner decided to refinance the properties to obtain a lower interest rate on his loans. He applied to his prior lender (Wells Fargo), which informed him he did not qualify for conventional financing because his units were classified as " 'resort-condo.' " A Wells Fargo mortgage associate told him the underwriter declined his application based on a review of the Legacy Villas CC&R's and on information provided on a required underwriting form known as Certification Form 921. This form had been completed by the Legacy Villas homeowners association's (HOA) property management firm.

Weiner then notified Summers of this problem. At the time Summers was no longer working for Centex, but was a Legacy Villas homeowner and HOA board member. The next day, Summers wrote an email to Wells Fargo's mortgage associate:

"I have just heard from Steven Weiner that the Wells Fargo underwriter has denied a refinance due to the information provided on Form 921 as prepared by PPM [Personalized Property Management], the property management company for Legacy Villas HOA. It is my assumption that PPM must have provided information that was not accurate. (PPM is a new management company for Legacy Villas, I'm not sure they are 'up to speed' yet.) [¶] . . . [¶] Please know that I will make my services available . . . to assist them in providing accurate information to the lenders for Legacy Villas."

Shortly after, the mortgage associate responded as follows:

"Yes everything that you stated is correct. As it stands now, we will not be able to complete Mr. Weiner's transaction because [PPM] checked off 'yes' on the HOA cert question 'Is the property a resort condo?' Also we have provided the CC&Rs to our underwriter. It states in there, as well, that the property is a resort condo. Wells Fargo [cannot] complete any type of financing on an investment property resort condos. . . . [With respect to your own refinance application], [w]e will need to provide CC&Rs and the HOA Cert. form and if these documents look the same as they do now, we won't be able to do your transaction either. If the documents are revised, and show that this is not a resort condo, then we should be fine for your transaction. [¶] However, in regards to Mr. Weiner's transaction, even if we get revised documents, I don't know if the underwriter will accept them. It is going to be very difficult for Quinn and me to explain to the underwriter how the things have changed so quickly. But, we will for sure give it a try."

The next day the mortgage associate sent an email to Weiner stating:

"Right now the 921 HOA Cert. and the CC&Rs show that the property is a resort condo. We would need both of these documents to be revised to show that property is not a resort condo. We will then turn in those documents to our underwriter, but even with that, we can't guarantee that he will accept them and approve the

appraisal. Would probably need to provide a detailed explanation why these documents were revised and still apply for some type of an exception. This is my feeling. . . ."

As a result of Wells Fargo's denial of his refinance application, Weiner was unable to continue making the monthly payments on the properties and was eventually "forced to sell each property via short sale for a loss in late 2009."

### *Complaint*

About six months after he sold the units, Weiner sued Centex. As amended in June 2011, the complaint alleged breach of contract, fraudulent inducement, and negligent misrepresentation. In the fraud/misrepresentation causes of action, Weiner alleged Centex (through its agent Summers) made numerous false statements to induce him to purchase the properties. The alleged false statements concerned the projected amount of rental income from the properties and information regarding the nature and viability of the Resort management program and related amenities.

The amended complaint also alleged: "Within the past six months [Weiner] discovered that authorized Centex agents and employees originally represented to Plaintiff's lenders, in the form of a '921 Condo Certification' form, that Plaintiff's Units were not condo-hotel units thus allowing Plaintiff to obtain conventional loans to purchase Plaintiff's Units. Centex, by and through their agent, Don Summers, pushed Plaintiff's loans through as 'conforming loans' in order to sell off the units quickly. Centex knew or should have known that the 921 Condo Certification contained false and misleading information with respect to the Legacy Villas units."

Based on these allegations, Weiner sought to recover for lost income and lost value in the residential units. Weiner also sought punitive damages on the fraud claim.

*Summary Judgment Motion*

Centex moved for summary judgment, contending Weiner's claims were barred by the parol evidence rule and the contractual estoppel doctrine, and the undisputed facts showed Weiner could not have justifiably relied on the alleged representations. In support, Centex relied on the provisions in the purchase agreement and disclosure documents under which Weiner specifically agreed that he was not buying the properties as an investment, agreed that he was not relying on any oral representations regarding potential rental income, and agreed that the Resort management program was independent of, and not promoted by, Centex.

Based on these facts, Centex argued Weiner's claims pertaining to future rental income, amenities, and the resort program were barred because the contractual terms were the final expression of the parties' intentions, and the contractual terms made clear that Centex was not making any representations on these matters. With respect to Weiner's claim that Centex falsely represented to Weiner's lender that the units were not " 'condo-hotel units,' " Centex contended this allegation did not reflect actionable fraud because the alleged statement was made to a third party and not to Weiner, and Weiner could not have relied on the statement because he did not learn about the statement until years after closing escrow.

In response to the summary judgment motion, Weiner dismissed his contract cause of action, but opposed the motion on the fraudulent inducement and negligent

misrepresentation claims. As to both causes of action, Weiner made two primary arguments. First, he argued that Centex was aware he was buying the property as investment property and the projected rental income was a material factor in the decision. Second, Weiner argued that Centex was liable for misrepresenting that "the units could be financed with conventional financing."

In support of these arguments, Weiner proffered his declaration in which he stated that before signing the Agreements, he met with Centex sales agent Summers on several occasions. Weiner said that Summers made various representations to him about the Resort management program and the expenses and income he would be expected to receive, and he relied on these statements. Weiner said that he "always made it clear to" Summers that he was purchasing the two units as investment properties because he already had a vacation home in La Quinta. Weiner acknowledged he signed each Agreement containing his statement that he was *not* buying the properties for investment purposes, but said he did so because Summers told him that any changes in the purchase agreements would not be accepted, and if he wanted to purchase the properties he was required to accept the purchase agreements as written.

With respect to his "conventional financing" misrepresentation claim, Weiner stated: "I based my decisions to purchase both units on my ability to obtain conventional financing. Had I known that conventional financing was unavailable for these properties, I would never have purchased them." Although he did not identify an affirmative misrepresentation made by Centex (or its agent) regarding financing, he stated: "I was never told that conventional financing was unavailable for the purchase of my units in

Legacy Villas by my lender or Mr. Summers. In fact, I do not believe I could have qualified for non-conventional financing as my down payment would have increased and the rate on my loan would have also substantially increased. Even if I could have qualified, I would not have purchased the units as the anticipated monthly return on my investments would have been substantially less, or nonexistent, making these investments impractical."

Weiner additionally relied on the facts (set forth above) relating to his discussions with the Wells Fargo mortgage associate, who notified him that his refinance loan application would not be approved because his units were designated as "resort-condos" in the Legacy Villas CC&R's and the 921 Certification Form. Weiner also submitted a one-page document dated May 30, 2007, pertaining to a prospective Legacy Villas borrower named "Levy." The form was signed by Ashley Griffin "For Don Summers." A box was checked on the form indicating the development was: "*Not an ineligible project (i.e. condotel, timeshare, resort type project, short term rental, non-conforming to zoning—can't be rebuilt to current density). . . .*" (Italics added.)

Weiner also produced a copy of the development agreement between the City of La Quinta and Centex, which reflects Legacy Villas was planned as a "resort residential master planned community," and contains provisions pertaining to transient occupancy taxes. Weiner additionally submitted the Legacy Villas CC&R's, which include provisions contemplating short-term rentals of units within the development. Weiner also proffered numerous excerpts of Summers's deposition transcripts. Of relevance here, Summers testified that although he did not specifically recall a conversation with Weiner

about financing, he agreed that he told "virtually every buyer at Legacy" that the unit being purchased "would likely qualify for conventional financing."

Centex asserted various evidentiary objections to Weiner's factual submissions, including to the one-page document relating to borrower "Levy." Centex argued this document lacked foundation and was not relevant to the summary judgment issues.

#### *Court's Summary Judgment Ruling*

After considering the parties' written submissions and conducting a hearing, the court granted Centex's summary judgment motion. The court found Weiner was "contractually estopped" from relying on the alleged representations, reasoning the undisputed evidence showed Weiner "read and signed each Purchase Agreement which acknowledged that the purchases were not an investment and that the seller made no representations regarding rental income . . . ." The court also stated Weiner had "received and signed Disclosure Statements" expressly precluding him from asserting the misrepresentations identified in the complaint.

With respect to Weiner's allegations that Centex misrepresented the availability of conventional financing, the court stated:

"Plaintiff argues that Centex concealed from him that he could not obtain conventional financing and that '[h]ad Plaintiff been aware of the requirements by the lenders for obtaining conventional financing, he could have made an informed decision as to whether to purchase his two units.' . . . This argument fails to constitute an actionable claim for misrepresentation because: (1) it was not pled in the FAC; (2) Plaintiff submits no evidence that Centex represented that he could obtain conventional financing or that he would not have purchased the units had he known he could not later refinance; and (3) he acknowledged in the Purchase Agreements that Centex made no representations about financing.

The court entered judgment in Centex's favor. Weiner appeals.

## DISCUSSION

### I. *Summary Judgment Standards*

Summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review a summary judgment de novo. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.) "We liberally construe the evidence in support of the party opposing summary judgment [citation], and assess whether the evidence would, if credited, permit the trier of fact to find in favor of the party opposing summary judgment under the applicable legal standards. [Citation.]" (*Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1346.) "We are not bound by the trial court's reasons for granting summary judgment because we review the trial court's ruling, and not its rationale." (*Avidity Partners, LLC v. State of California* (2013) 221 Cal.App.4th 1180, 1192.)

### II. *Governing Law on Fraud and Negligence Claims*

Weiner contends the court erred in granting summary judgment on his fraudulent inducement and negligent misrepresentation claims.

Fraud in the inducement is a subset of the fraud tort occurring when the promisor's consent is induced by fraud. (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294.) The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) scienter or knowledge of its falsity; (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Ibid.*)

The elements of negligent misrepresentation are similar but do not require knowledge of falsity. (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.) "A defendant who makes false statements ' "honestly believing that they are true, but without reasonable ground for such belief, . . . may be liable for negligent misrepresentation." . . . ' " (*Ibid.*) Additionally, "a positive assertion is required; an omission or an implied assertion or representation is not sufficient." (*Ibid.*)

### III. *Analysis*

In his complaint, Weiner alleged that Centex made numerous false statements to induce him to purchase the two residential properties. These alleged misrepresentations related to the development's amenities, the nature, scope, and existence of the Resort management program, and the amount of rental income that would be earned from the residential units. In moving for summary judgment, Centex produced evidence showing that it either did not make these representations or the representations were true. Centex further presented evidence that the alleged misrepresentations were contradicted by the plain words of the Agreements and the written disclosures, and thus Weiner could not have justifiably relied, and/or was estopped from relying, on the alleged misrepresentations.

The trial court agreed with these arguments and found Weiner did not present any evidence creating a triable issue of fact on these issues. On appeal, Weiner does not challenge this conclusion. He instead argues that triable issues of fact exist on his additional claim that he was fraudulently induced to purchase the units based on Centex's

agent's implied representation regarding the availability of conventional financing for his units. We conclude that even assuming Weiner had properly pled this claim in his amended complaint, the claim is unsupported by the factual record and does not show a viable theory for recovery under applicable legal principles.

First, the representation about the availability of conventional financing was true. Weiner did obtain conventional financing to purchase the two units. To prove a fraud claim, the plaintiff must show the defendant made a false representation. (See *Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 434.) In explaining his fraud theory, Weiner states his argument is based on Centex's misrepresentation that conventional financial was available when he purchased the property, and he makes clear he is "*not alleg[ing]* that Centex misrepresented that [he] could obtain conventional loans *when he attempted to refinance.*" (Italics added; underlining omitted.) The undisputed facts show Weiner obtained conventional financing at the time of the purchase. Thus, Weiner's allegation that Centex misrepresented the availability of conventional financing is not actionable.

Weiner argues the financing representation was actionable fraud because Centex's implied assertions that he could obtain conventional financing were based on Centex's misrepresentation to the lender that the Legacy Villas condominium units were not " 'resort-condo' " units. Weiner maintains that had he known conventional financing was not "actually available" because it was based on the " 'resort-condo' " misrepresentation he would never have purchased the units because that "would have raised red flags" about his ability to later refinance.

This argument is unavailing. First, its central premise lacks evidentiary support. There is no evidence that conventional financing was not "actually available" in 2007 or that the bank's approval of his loan in 2007 was based on a misrepresentation. Weiner presented evidence that in April/May 2008 one bank (Wells Fargo) characterized his units as a "resort condo" and therefore would not approve a refinancing loan at that time. However, this fact does not lead to a reasonable inference that the bank was using this same underwriting criteria one year earlier.<sup>1</sup> Additionally, Weiner's loan applications in 2007 and 2008 were different. In 2007 the *purchase loan* application was based on purchase contracts in which the buyer (Weiner) affirmatively represented that the units were *not* being purchased as investments; whereas in 2008, the *refinance loan* application was based on the actual facts showing the units *were* being rented and held for investment, and thus subject to investment loan criteria.

To show Wells Fargo approved his prior loan based on Centex's misrepresentation, Weiner relies on the one-page 2007 document pertaining to a loan submitted by a person identified as "Levy" that was filled out by Ashley Griffin "For Don Summers." On this form, a box is checked indicating that Levy's unit was not a "resort type project." However, Weiner submitted no foundation or authentication for this document. There is no evidence who prepared it or that it was considered by Wells Fargo. Further, the record contains no facts showing whether Levy's loan application was approved or disapproved,

---

<sup>1</sup> That there may have been a difference in residential loan underwriting standards between 2007 and 2008 is hardly surprising given the well-known economic downturn and housing credit crisis occurring during that time.

and there is no evidence that in 2007 Wells Fargo considered the resort-condo category to be a relevant factor in determining whether to grant a loan application. Likewise, there is no showing that a similar document was submitted in connection with Weiner's loan application, *or that Wells Fargo relied on such a document in deciding to approve Weiner's 2007 loan.*

Equally important, there are no facts showing that Wells Fargo was unaware of the true nature of the Legacy Villas development at the time it approved Weiner's loan. Under Weiner's submitted facts, before approving a loan in 2007, the bank reviewed a copy of the Legacy Villas CC&R's, which made clear that at least some residences in the development were used as short-term resort rentals. Despite this knowledge, Wells Fargo approved Weiner's 2007 loan application. Although there may be factual issues whether Weiner's units were "resort-condo," there is no evidence that Weiner would have been unable to obtain financing even assuming they were given this characterization in 2007. Weiner does not direct us to any evidence in the record showing that Wells Fargo approved Weiner's 2007 loan based on a misrepresentation regarding the nature of the units that Weiner intended to buy.

Because there is no evidence showing Weiner obtained his loan based on *Centex's* misrepresentation, there is no support for Weiner's theory of recovery. Weiner argues that he presented evidence showing he "made clear throughout the negotiations that the availability of conventional financing was imperative to his purchase," and that he did "not in fact get what he bargained for, as Centex misrepresented the availability of conventional financing which was unavailable." The flaw in this argument is that Weiner

*did* get the benefit of the bargain—he obtained conventional financing for his purchase. What he did not receive was conventional financing for his attempted *refinance* loan application in 2008. However, he admits that Centex made no representation that he could successfully refinance his properties in the future and does not suggest Centex had a duty to disclose any facts about his ability to refinance in the future. Thus, there is no reasoned basis to conclude Centex can be held liable for fraud or negligent misrepresentation based on the bank's denial of his refinance application in 2008.

Further, even assuming Centex (or its agent) made a misrepresentation to the bank in filling out a loan certification form in 2007 and the *bank* relied on the representation, a party may not recover on a misrepresentation to a third party if the plaintiff never saw, heard, or knew about the misrepresentation. There is no evidence that Weiner ever knew about or saw this document. To the contrary, Weiner admits that he saw this certification form long after he purchased the units and several months *after* he filed his original complaint.

Based on our conclusion that Weiner did not present evidence of an actionable misrepresentation, we need not reach Weiner's contentions that the court erred in concluding his claims were barred under the contractual estoppel doctrine and/or justifiable reliance principles. Absent an actionable misrepresentation, a party may not prevail on a fraud claim even assuming there was actual and reasonable reliance on a statement made by the defendant.

We also find unhelpful Weiner's discussion of *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1183. *Riverisland* recognized

a broad fraud exception to the parol evidence rule and held evidence of a claimed fraudulent statement may be admissible even if the statement is inconsistent with the parties' written agreement. (*Id.* at pp 1174-1183; see *Julius Castle Restaurant v. Payne* (2013) 216 Cal.App.4th 1423, 1440-1442.) Our conclusion is consistent with *Riverisland's* holding. We have considered all the evidence presented in the summary judgment proceedings—including the alleged oral representations that were at variance with the written purchase documents—and conclude the evidence did not disclose an actionable misrepresentation made by Centex (or its agents) to Weiner. Based on this conclusion, the court properly granted Centex's summary judgment motion.

#### DISPOSITION

Judgment affirmed. Appellant to bear respondent's costs on appeal.

HALLER, Acting P. J.

WE CONCUR:

McDONALD, J.

AARON, J.