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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CLAUDIO ROQUE-DURAN, Plaintiff and Appellant, v. JANETTE M. BIRD et al., Defendants and Respondents.	F063155 (Super. Ct. No. 08CECG00521) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Mark W. Snauffer, Judge.

Yarra, Kharazi & Associates and H. Ty Kharazi for Plaintiff and Appellant.

Caswell Bell & Hillison and Kimberly L. Mayhew for Defendants and Respondents.

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Plaintiff Claudio Roque-Duran (Duran) sued Guarantee Real Estate (Guarantee) and its agent, Janette M. Bird,[1] for fraud, negligence, breach of fiduciary duty and constructive fraud for allegedly failing to disclose a life estate prior to Duran's purchase of real property. The trial court precluded Duran from presenting expert testimony and/or from testifying on the diminution of value of the real property attributable to the life estate at trial because no such evidence had been disclosed during discovery and motions in limine addressing this issue had been granted. The trial court granted a nonsuit based upon failure to provide evidence of damages.

Duran appeals, contending the trial court should have allowed him to present evidence on damages. We disagree and will affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Duran signed an agreement to purchase real property located in Sanger, California, from a probate estate for $350,000. The real estate agent was Bird of Guarantee. Title to the property reserved a life estate for Cora H. Ramirez.

The second amended complaint filed by Duran, which is the operative complaint here, alleged causes of action against Guarantee for fraud, negligence, breach of fiduciary duty, and constructive fraud. The causes of action were based on the premise that Guarantee had failed to inform Duran that Ramirez had a life estate in the real property Duran purchased. There was no cause of action for rescission set forth in the second amended complaint.

During discovery Duran was deposed and asked how much less the real property was worth due to the life estate. Duran responded that he did not know.

Duran's expert, Curtis Page, was deposed and stated he had not been asked to form an opinion on damages and had no opinion on the diminution in value attributable

[1]Janette M. Bird was sued erroneously as Jeanette M. Bird.

to the life estate. Page also stated he had not been asked to perform a rent survey, which would be necessary in order to form an opinion on any loss.

Prior to trial, Guarantee filed and served motions in limine seeking to preclude Duran and Duran's expert from testifying regarding damages allegedly incurred by Duran. The trial court granted the motions. Duran filed and served a motion in limine seeking to preclude lay witnesses from offering expert opinions. The trial court granted Duran's motion.

At the commencement of the trial, after Duran's opening statement, Guarantee moved for nonsuit, which the trial court denied.

During trial, when Duran attempted to testify regarding the diminution in value to the real property attributable to the life estate, Guarantee objected and the trial court sustained the objection. When Duran attempted to offer evidence of additional damages, such as lost income, the cost of insurance, taxes paid, and irrigation costs, Guarantee objected. The trial court eventually sustained the objection on the basis that these types of damages were restitution damages that could be claimed if there was an action for rescission, but there was no cause of action for rescission in the second amended complaint.

At the close of presentation of evidence by Duran, Guarantee renewed its motion for nonsuit. Based on the failure of Duran to present any evidence of damages, the trial court granted the motion.

DISCUSSION

Duran contends the trial court abused its discretion in excluding evidence of damages at trial and erred in granting the motion for nonsuit based on lack of evidence of damages. He also contends the trial court applied an incorrect measure of damages.

I. Evidentiary Issues

The parties agree that the proper standard of review for the trial court's rulings on the limitation of evidence is abuse of discretion. (*Dillingham-Ray Wilson v. City of Los*

Angeles (2010) 182 Cal.App.4th 1396, 1403; *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1294.) When exercising its discretion, the trial court cannot act arbitrarily and must adhere to legal principles. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393-394.) Here, we see no error by the trial court.[2]

The trial court granted a motion in limine to preclude Duran's retained expert, Page, from testifying at trial on the diminution of value to the real property resulting from the life estate. Page had not been asked his opinion, nor did he have an opinion, on this point at the time of his deposition. The trial court also granted Duran's motion to exclude all expert testimony not disclosed during depositions, as well as Guarantee's similar motion.

In his appellate brief, Duran fails to argue or cite any authority for the proposition that precluding Page from testifying at trial was an abuse of discretion. Duran has waived or abandoned this contention by failing to present a legal argument. (*Walker v. Sonora Regional Medical Center* (2012) 202 Cal.App.4th 948, 952 & fn. 2.)

Duran's motion in limine No. 8 sought to preclude lay witnesses from testifying "specifically [to] the monetary value of the disputed properties with or without the presence of the life estate. (Evidence Code [§§] 800-803)." Duran concedes he sought to exclude expert testimony by any lay witness. Duran's motion in limine made no distinction between his testimony and that of any other lay witness.

At the time the trial court was preparing to rule on the motion in limine to exclude lay testimony, the trial court noted that Duran and Guarantee had filed similar motions in this regard. The trial court then stated that there "[didn't] seem to be any controversy"

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[2]The California Supreme Court recently reaffirmed this standard of review in *Sargon Enterprises, Inc. v. University of Southern California* (Nov. 26, 2012, S191550) ___ Cal.4th ___[2012 Cal. Lexis 10713], where it upheld the trial court's exclusion of expert testimony.

about granting the motion in limine "that no expert testimony be offered by a lay witness, specifically [to] the monetary value of the disputed properties with or without the presence of the life estate."

Duran did not seek to clarify or limit the trial court's ruling so as to allow him to testify as a lay witness on value and did not seek to withdraw his motion to preclude lay testimony on value. "Under the doctrine of waiver, a party loses the right to appeal an issue caused by affirmative conduct or by failing to take the proper steps at trial to avoid or correct the error. [Citation.]" (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1167.) "Similarly, under the doctrine of invited error, a party is estopped from asserting prejudicial error where his own conduct caused or induced the commission of the wrong." (*Ibid*.)

The ruling that prevented Duran from testifying on the diminution of value as a result of the life estate was a direct result of the motion in limine filed by Duran to preclude such testimony. He now is precluded from claiming that granting his motion was prejudicial error.

II. Measure of Damages

Duran contends the trial court erred in applying the Civil Code section 3343[3] measure of damages where the allegation is fraud by a fiduciary. In doing so, the trial court relied upon the case of *Hensley v. McSweeney* (2001) 90 Cal.App.4th 1081 (*Hensley*), an opinion issued by this court, wherein we held that the appropriate measure of damages for fraud by a fiduciary in the purchase, sale, or exchange of real property, as set forth in section 3343, is out-of-pocket damages. As we stated in *Hensley*:

> "In fraud cases involving the purchase, sale, or exchange of property, as here, the out-of-pocket measure of damages applies as set forth in Civil Code section 3343. [Citation.] When the tort involves a fiduciary's

[3]All further statutory references are to the Civil Code.

> negligent misrepresentation, the out-of-pocket measure of damages is still the applicable standard. [Citation.]" (*Hensley*, at p. 1085.)

Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The trial court did not err in concluding it was bound by this court's holding in *Hensley* and therefore it applied the correct measure of damages.

Out-of-pocket damages awards the difference in value at the time of the transaction between what the plaintiff gave and what the plaintiff received. (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 870.) Duran argues he presented "figures" on the difference in value. He is incorrect. Duran presented no evidence on the diminution in value caused by the life estate as a result of his failure to disclose any such evidence during discovery and the trial court's rulings on the motions in limine.

As for Duran's request that we clarify the holding of *Hensley* because the holding purportedly was used as a basis for precluding him from testifying as to the diminution in value attributable to the life estate, we decline his request. Duran's testimony on this point was precluded because of his own motion in limine.

We also decline to depart from the holding in *Hensley* as Duran invites us to do. The measure of damages articulated in *Hensley* is longstanding; review was denied in *Hensley* and there is no contrary authority from the California Supreme Court. (*Hensley, supra,* 90 Cal.App.4th at p. 1086.)

III. Motion for Nonsuit

Duran contends the trial court erred in granting the motion for nonsuit by Guarantee. He is mistaken.

A nonsuit is properly granted where a plaintiff cannot prove damages. (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1542.) Here, Duran failed to provide evidence of recoverable damages.

In opposing the nonsuit and at trial, Duran made an offer of proof. The trial court found, however, that Duran's offer of proof failed to establish that the additional damages he sought were recoverable under section 3343. Additional damages recoverable under section 3343 include items such as actual expenditures made by a plaintiff, damage to other property, and personal injuries, provided they are the proximate result of fraud or misrepresentation. (*Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 762-763.)

Duran argued that his additional damages should include (1) the benefit of the bargain, (2) down payment, monthly payments, and cost of planting trees, (3) lost profits, (4) lost rental value, and (5) having to deal with the life tenant.

The benefit of the bargain is not the appropriate measure of damages. (*Hensley, supra,* 90 Cal.App.4th at p. 1086.) The down payment, monthly payments, and cost of planting trees are incidental damages recoverable in a rescission action, and Duran did not have a cause of action for rescission against Guarantee or Bird. (*Runyan v. Pacific Air Industries, Inc.* (1970) 2 Cal.3d 304, 314-318.)

On the lost profits claim, Duran fails to cite to any portion of the record demonstrating he presented evidence of lost profits. If an appellant fails to cite to the record to support a contention, the issue is deemed forfeited. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.) As for alleged lost rental value, that is not additional damage that is recoverable under section 3343. (*Oliver v. Benton* (1949) 92 Cal.App.2d 853, 856.) In terms of having to deal with the life tenant, Duran failed to present any evidence of monetary damages or any activity that would bring such a claim into the realm of recoverable additional damages. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1073.)

Duran also argued at trial that he should be able to recover all money paid for the real property, while still retaining the real property, because he would not have purchased the property had he known of the life estate. This court, however, addressed and rejected a similar contention in *Overgaard v. Johnson* (1977) 68 Cal.App.3d 821, 827.

Duran completely failed to present evidence of recoverable damages. Therefore, the trial court did not err in granting the motion for nonsuit. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.)

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

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CORNELL, Acting P.J.

WE CONCUR:

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GOMES, J.

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KANE, J.