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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HIT, INC.,

Plaintiff and Appellant,

v.

NEWMEYER & DILLION, LLP, et al.,

Defendants and Respondents.

G044927

(Super. Ct. No. 30-2009-00304810)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John C. Gastelum, Judge. Affirmed.

Ruehmann Law Firm and Stephen C. Ruehmann for Plaintiff and Appellant.

Rus, Miliband & Smith, Ronald Rus, Randall A. Smith, M. Peter Crinella; Morris, Polich & Purdy, Jeffrey H. Belote and Elizabeth A. England for Defendants and Respondents.

HIT, Inc., appeals from a judgment in this professional malpractice action against Newmeyer & Dillion, LLP, and attorney Jon J. Janecek (hereafter collectively “Newmeyer”), and Cushman & Wakefield of California, Inc., and brokers, Marc D. Renard and Manfred W. Schaub (hereafter collectively “Cushman”). HIT wanted to purchase a lessee’s leasehold interest in commercial real property, but the lessor exercised its right of first refusal to buy out the lease on the terms HIT negotiated. HIT alleged the defendants, the attorneys and brokers who represented it in the transaction, failed to advise it the lease contained a right of first refusal. The trial court sustained the defendants’ demurrers without leave to amend concluding HIT failed to allege proximately caused damages. HIT contends it adequately alleged the defendants were the “but for” cause of damages because had it known of the right of first refusal, it would have negotiated a less attractive deal so the lessor would not have exercised its rights. We find no merit to its contention and affirm the judgment.

FACTS AND PROCEDURE

Original Complaint

In September 2008, HIT, through its president Jack Mau, learned of a listing for the sale of a leasehold interest in commercial property located in Irvine, California (the Property). The Property was owned by the City of Irvine (the City), which had leased it to Crescent Properties (Crescent),¹ pursuant to a master lease that was renewable until the year 2031 (the Lease). There was a “first class roller hockey training facility” on the Property operated by Crescent’s sublessee. Crescent’s leasehold interest was listed for sale at \$3.125 million through Cushman.

Cushman acted as real estate broker for both Crescent (the seller) and HIT (the buyer), and HIT retained Newmeyer to perform a legal review. At the heart of this action is HIT’s allegation that neither Cushman nor Newmeyer advised it the

¹ Crescent was successor in interest to the original lessee.

Lease gave the City a right of first refusal on any proposed sale of Crescent's leasehold interest in the Property.

The complaint alleged in performing its "due diligence," HIT attended several meetings with the City's staff to determine what the City would require to approve assignment of Crescent's lease to HIT. City staff repeatedly represented the City's only concern was whether HIT had the financial ability to remediate the Property at the end of the lease term.

In January 2009, HIT and Crescent reached a sales price of \$1.2 million for the Lease. HIT asked Newmeyer to "evaluate" the proposed deal and "inform HIT of any potential pitfalls or conditions to closing." Newmeyer only mentioned the remediation requirement.

Thereafter, HIT had further meetings with City staff to discuss the City's requirements for approving assignment of the Lease. City staff was aware of the proposed purchase price. City staff again indicated to HIT the City only wanted documentation HIT had the financial ability to conduct remediation. Encouraged by that response, HIT pressed on with its negotiations.

By March 2009, Crescent's financial condition was deteriorating enabling HIT to negotiate the purchase price down to \$650,000. HIT went back to the City, and was again assured the City only had remediation concerns. HIT submitted requested financial information to the City on April 8, 2009, understanding the matter would be placed on the next City Council agenda for approval.

On April 23, 2009, HIT received a letter from the City, which Cushman told HIT merely pertained to obtaining additional financial information. HIT forwarded the letter to Newmeyer for "advice." Neither Newmeyer nor Cushman told HIT the letter stated the City was considering exercising its right of first refusal.

On May 10, 2009, Crescent informed HIT approval of the assignment of the Lease had been placed on the City Council's May 12, 2009, agenda, but the City was also contemplating exercising its right of first refusal contained in the Lease. It was at this time HIT learned the Lease provided the City with a right of first refusal. The City Council voted to exercise its right of first refusal and bought out Crescent's leasehold interest in the Property.

Based upon the foregoing general allegations, HIT's complaint contained three causes of action. A fraud cause of action against the City alleged the City failed to disclose it had a right of first refusal under the Lease. HIT repeatedly met with staff to inquire as to the conditions of approval, and was repeatedly told by staff remediation was the City's only concern. Those statements were false and made to encourage HIT to continue to negotiate with Crescent to obtain a lower price for the City's benefit. HIT reasonably relied on the City's false statements by negotiating a better deal with Crescent than the original agreed upon purchase price of \$1.2 million. Had HIT known the City had a right of first refusal, it would not have submitted the reduced purchase price deal to the City without first negotiating a solution to its first refusal right.

The complaint contained professional negligence causes of action against Newmeyer and Cushman. HIT alleged it hired Newmeyer to evaluate the transaction and advise it "of the legal import of the underlying documents, including [the] . . . [L]ease." It alleged Cushman "had a duty to investigate and disclose all material facts pertaining to the transaction, including the [right of first refusal] provision in the . . . [L]ease" HIT relied on the defendants "[i]n deciding whether and how to negotiate the transaction[.]" Had HIT been informed of the right of first refusal it could have negotiated a sales price at which the City would not have

exercised its right of first refusal. The defendants' negligence caused HIT to incur expenses and lose the benefit of its negotiated deal with Crescent.

Motion for Judgment on the Pleadings

Newmeyer filed a motion for judgment on the pleadings, which was granted with leave to amend. The trial court found the complaint failed to allege injury caused by Newmeyer and any harm to HIT was caused by the City exercising its right of first refusal.

First Amended Complaint

HIT's first amended complaint (FAC), again alleged causes of action against the City for fraud and Newmeyer and Cushman for professional negligence. The general allegations were the same with the following additions: HIT alleged the City never "explain[ed to HIT] the meaning of the first refusal clause in the . . . [L]ease . . . [;]" despite having the Lease documents, neither Newmeyer nor Cushman ever advised HIT about the right of first refusal clause; the City staff specifically asked HIT about the sales price and encouraged HIT to negotiate a lower price; and City staff had "somehow" figured out HIT was ignorant of the existence of the first refusal clause and exploited that ignorance to get HIT to negotiate a better price for the City.

The FAC's professional negligence causes of action against Newmeyer and Cushman added the following paragraph as to damages (paragraphs 21 and 26): "Defendants' negligence caused HIT to incur expenses related to the underlying transaction and to lose the benefit of its negotiated transaction, as well as other economic damages In particular, had HIT known that the City had a right of first refusal; it would have taken a different negotiating path with the City, and would have secured the City's agreement to not exercise its right of first refusal in advance of negotiating a price below [\$1.2 million] and finalizing the transaction. [HIT is

informed and believes] . . . the City would have waived its right of first refusal at the [\$1.2 million] price initially negotiated, thereby enabling [HIT] to consummate the transaction. But for the negligence of [Newmeyer and Cushman], [HIT] would have closed the deal at [\$1.2 million], which would have still allowed [HIT] to make a profit in excess of [\$3.5 million] on the remaining leasehold. Thus, not only did these Defendant[s'] negligence cause tangible economic loss related to negotiating the deal, they also caused [HIT] to lose the opportunity to close the deal at all, thus losing all profits related thereto.”

As to the fraud cause of action against the City, the FAC added allegations that Mau repeatedly asked City staff about the existence of any terms or conditions that could prevent HIT from closing the transaction, and staff expressly represented there were none. City staff in fact knew about the City’s right of first refusal and deliberately concealed its existence. HIT alleged the City’s deliberate “concealment and denials would have been ineffective had [Newmeyer and Cushman] performed their duties and informed HIT of the existence and import of the first refusal clause.” “[L]acking adequate information from its attorney and broker, [HIT] relied on the City’s false statements and proceeded to negotiate and present a deal on terms far more favorable than those initially negotiated with Crescent.”

Demurrers to FAC

Newmeyer and Cushman filed demurrers to the FAC. The trial court sustained the demurrers with leave to amend. Although the court’s order is not in the record, at the hearing it stated the complaint was defective due to the conclusory allegations of damages. The trial court cautioned HIT it had only one more chance to allege facts, not mere conclusions, as to damages. Before HIT’s second amended complaint was filed, the City successfully moved for summary judgment.

Second Amended Complaint

HIT's second amended complaint (SAC), contained allegations mostly similar to those in the prior pleadings, but changed the original sales price to \$1.1 million. The fraud cause of action against the City was deleted. HIT continued to allege the same basic conduct by the City staff but omitted allegations to the effect that staff deliberately misled or concealed there was a right of first refusal. HIT added allegations it believed the City had no interest in buying out the Lease for more than \$1 million "based on prior valuation analyses" and staff told HIT if it got the Lease for anything less than \$1 million, "it would be 'getting a good price.'" After HIT submitted the \$650,000 purchase agreement, the "City . . . attempted to purchase the [P]roperty itself for \$700,000," but Crescent rejected the City's proposed terms—apparently preferring the terms of HIT's \$650,000 offer. The City then exercised its right of first refusal to buy on the terms of HIT's offer. "At no time did the City express interest in purchasing the [P]roperty for [\$1.1 million]," and HIT believed the City would not have exercised its right of first refusal at that price.

The SAC added allegations as to Newmeyer and Cushman that had they properly advised HIT of the City's right of first refusal, HIT could have either negotiated a price that took into consideration the City's right (i.e., something over \$1 million), or simply closed the deal at \$1.1 million "a price the City would not have matched based on its own valuation of the deal."

Demurrers to SAC

The trial court sustained demurrers to the SAC without leave to amend. As to Cushman, the court concluded only out-of-pocket damages were recoverable against a real estate broker in a negligence action and HIT failed to allege anything more than nominal damages. As to Newmeyer, the court concluded HIT could not satisfy the "but for" causation requirement and alleged nothing more than nominal

damages. HIT's allegations as to what the City might have done if HIT was aware the City had a right of first refusal (i.e., approved a transfer of the Lease to HIT at a higher price) was complete speculation.

STANDARD OF REVIEW ON DEMURRER

Our standard of review is well established. We review an order sustaining a demurrer by exercising our independent judgment to determine whether a cause of action has been stated under any legal theory. (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 788.) We must accept as true properly pleaded allegations of fact but not contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "The burden is on [appellant] to demonstrate the manner in which the complaint might be amended, and the appellate court must affirm the judgment if it is correct on any theory. [Citations.]" (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459-460.)

DISCUSSION

HIT contends it adequately alleged causes of action for professional negligence against Newmeyer and Cushman. It does not distinguish between the defendants and addresses only the issues of causation and damages. We conclude HIT has not stated actionable claims against either defendant.

The trial court concluded HIT's allegations of damages proximately caused by Newmeyer were inadequate and speculative. Additionally, as to Cushman the trial court noted only out-of-pocket damages (and not benefit-of-the-bargain damages), are recoverable (see *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1249-1250 [plaintiff only entitled to actual or "out-of-pocket" losses suffered because of fiduciary's negligent misrepresentation]; see also *Hensley v. McSweeney* (2001) 90 Cal.App.4th 1081, 1085), and HIT had alleged only nominal damages in this

regard. We conclude HIT has failed to allege either defendant was the proximate cause of damages.

“The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional’s negligence. [Citations.]” (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 (*Budd*), superseded by statute on other grounds; see also *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.)

In both litigation and transactional malpractice actions, a plaintiff “must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result.” (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244.) “The purpose of this requirement, which has been in use for more than 120 years, is to safeguard against speculative and conjectural claims. [Citation.] It serves the essential purpose of ensuring that damages awarded for the attorney’s malpractice actually have been caused by the malpractice.” (*Id.* at p. 1241.) Although ordinarily a causal connection between the alleged negligence and the injury “is accomplished by implication from the juxtaposition of the allegations of wrongful conduct and harm[,] [citation] . . . where the pleaded facts of negligence and injury do not naturally give rise to an inference of causation the plaintiff must plead specific facts affording an inference the one caused the other. [Citation.]” (*Blain v. Doctor’s Co.* (1990) 222 Cal.App.3d 1048, 1066.)

Additionally, a claim for professional negligence also requires allegations of recoverable damages. “If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. [Citation.] The mere breach of a

professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. [Citations.]” (*Budd, supra*, 6 Cal.3d at p. 200.) “[D]amages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable. [Citation.]’ [Citation.]” (*Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 661-662.)

HIT’s legal malpractice cause of action fails because it has not alleged damages proximately caused by the defendants. HIT alleged in all three iterations of its complaint the City had the right of first refusal to buy out the Lease on whatever terms HIT negotiated with Crescent. HIT did not lose the deal because of the defendants’ alleged failure to advise it about the terms of the Lease, it lost the deal because the City exercised its legal right to step into HIT’s shoes.

HIT’s assertion that had it known about the City’s right of first refusal under the Lease, it could have negotiated a different deal, i.e., found a price at which the City would not have exercised its right of first refusal, is pure speculation. So too is HIT’s assertion it would have simply closed the transaction at the originally agreed upon \$1.1 million price and eventually made \$3.5 million profit on the Lease. Any transfer of the Lease required the City’s approval, and the City had the right to buy the Lease. Although HIT deleted many of the allegations in its SAC concerning the City’s conduct, it is bound by its earlier pleadings. (See *Lockton v. O’Rourke* (2010) 184 Cal.App.4th 1051, 1061 [under “sham-pleading” doctrine admissions in original complaint superseded by amended pleading remain within court’s cognizance; alteration of allegations to conceal fundamental vulnerabilities not accepted].) HIT’s original complaint and FAC alleged City staff was deliberately concealing the existence of the right of first refusal for the specific purpose of duping HIT into negotiating a better price for the City. It alleged Mau met repeatedly with City staff to

ask staff if there were any terms or conditions that could preclude HIT from closing the transaction with Crescent and the City staff deliberately misrepresented there were not.

HIT's reliance on *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, and *Hartzell v. Myall* (1953) 115 Cal.App.2d 670, is misplaced. It cites the cases for the proposition that to survive demurrer, it only had to allege its attorney's negligence caused its damage. But those cases did not involve prior pleadings containing damaging admissions. The trial court correctly sustained the demurrers. HIT has not suggested there is any manner in which its complaint could be amended. (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 7 [appellant's burden to demonstrate defect can be cured by amendment].)

DISPOSITION

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

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.