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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HOWARD D. THOMAS et al.,

Plaintiffs and Respondents,

v.

BRYAN HARMON,

Defendant and Appellant.

G045786

(Super. Ct. No. 30-2009-00319890)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frederick Paul Horn, Judge. Affirmed.

J. Scott Souders for Defendant and Appellant.

Ostergar Hunter Law Group and Allen C. Ostergar III for Plaintiffs and Respondents.

* * *

Defendant Bryan Harmon appeals from a judgment for plaintiffs Howard and Betty Thomas on their contract and fraud causes of action. Defendant contends the court misconstrued the parties' real estate purchase agreement to require defendant to pay \$275,000 to plaintiffs when he resold the house he bought from them. He further contends he cannot be liable for fraud because the \$275,000 in contract damages fully compensates plaintiffs for any loss due to fraud.

We disagree, and affirm. The contract entitled plaintiffs to \$275,000 upon the resale of the house. That is true whether the contract is read on its face or, as the court did, construed in light of the parties' discussions on the matter. And the record sufficiently shows defendant defrauded plaintiffs, causing damage. Plaintiffs receive no double recovery from the \$275,000 compensatory damages award, and defendant is not prejudiced thereby.

FACTS

Plaintiffs owned a house on Fernglen Drive in Yorba Linda. Defendant repeatedly told plaintiffs he was interested in buying their house. When plaintiffs finally decided to sell the house, they contacted defendant because "the property needed some work done . . . and he had represented himself as a contractor and said all of that stuff would be easy for him." Defendant told plaintiffs' daughter he was a general contractor. Actually, he had only a specialty license to install pool equipment.

Defendant agreed to buy the house for \$725,000 in late-2005. He had decided to "purchase the house and resell it on the market at a profit," and "similar houses in good shape [were] selling in the neighborhood of \$900,000 to a million at the time." Defendant obtained an inspection report. He represented the repairs were "easy work and he could accomplish all of that in two months." He agreed to "be responsible for costs of repair."

But defendant could qualify to borrow only \$450,000. So plaintiffs and defendant agreed defendant would pay \$450,000 “as a down payment” and pay the remaining \$275,000 “at the end of when he finished [repairing] the house and resold it.” Defendant “promised to pay [plaintiffs] back the [\$]275[,000] as soon as the house was resold.” Plaintiffs “considered [the] \$275,000 [as] basically a second.”

Meanwhile, other prospective buyers told plaintiffs they were interested in buying the house if it were “fixed.” Plaintiffs told defendant about their interest.

Plaintiffs and defendant executed a written agreement memorializing the transaction on February 13, 2006. Plaintiffs’ daughter drafted the agreement. It provided in its entirety: “**Purchase Agreement and Distribution of Funds Following Sale of Property** [¶] **Sale of property 20061 Fernglen Drive, Yorba Linda, CA 92886-6054** [¶] 1) Bryan Harmon will be fully responsible, financially and otherwise to make all necessary repairs to said property in an effort to bring the house and ground to a level of condition whereas we can resell said property. (See Inspection Report Dated January 5, 2006) [¶] 2) Wendy Thomas will act as and represent Howard and Betty Thomas’ interest in said property. [¶] 3) Both parties will have equal decision making in all aspects related to this property. [¶] 4) Both parties will make every effort to repair and resale this property as soon as possible. [¶] **Upon the resale of said property, the funds will be distributed as listed below.** [¶] 1) Howard and Betty Thomas will receive Two Hundred Seventy Five Thousand Dollars, \$275,00[0].00. [¶] 2) Bryan Harmon will receive Four Hundred Fifty Thousand Dollars, \$450,000.00. With these funds, existing mortgage will be paid off and residue given to Bryan Harmon. [¶] 3) Bryan Harmon will be reimbursed all monies spent to repair said property, as listed in January 5, 2006 Inspection Report. [¶] 4) Bryan Harmon will then receive Seventy Five Percent, (75%) of all profits beyond the original sale price of Seven Hundred Twenty Five Thousand Dollars, \$725,000.00 and reimbursable costs to make repairs to said property. [¶] 5) Howard and Betty Thomas will receive Twenty Five Percent, (25%) of

all of all profits beyond the original sale price of Seven Hundred Twenty Five Thousand Dollars, \$725,000.00 and reimbursable costs to make repairs to said property.”

Defendants executed a grant deed transferring sole title to the house to defendant so he “could obtain his \$450,000 loan” After escrow closed, defendant recorded a grant deed transferring a 38 percent interest in the house to plaintiffs. This was done “to protect [plaintiffs’] \$275,000 that was owed back to [them]” — 38 percent of \$725,000 is \$275,500.

The prospective buyers agreed to purchase the house from defendant and plaintiffs for \$950,000 in March 2006, depositing \$10,000 in escrow. The purchase agreement required defendant to complete a long list of repairs and upgrades. It also provided the sale was contingent on the prospective buyers’ sale of their own home. The prospective buyers were unable to sell their home, and they canceled escrow at the end of May 2006.

With renovations still underway in late 2006, defendant told plaintiffs he wanted to refinance the \$450,000 he had borrowed to buy the house and “take a small amount of money to fix three minor items left to finish the house” Plaintiffs agreed to transfer their 38 percent interest back to plaintiff to facilitate the refinancing. Defendant then obtained a negative amortization loan against the house for \$584,000. Defendant used the excess \$134,000 to pay off a \$100,000 line of credit he had taken out to fund the repairs, reimburse himself for his monthly mortgage payments, and retain the remaining \$22,000. Defendant transferred back to plaintiffs their 38 percent interest, but did not tell them about the \$584,000 loan or how he used the excess \$134,000.

The house was finally resold in January 2008 for \$680,000. Of that, approximately \$615,000 was used to pay off defendant’s refinanced negative amortization loan, including interest and penalties. Only about \$18,000 remained after escrow and broker fees were paid. Defendant refused to release those funds to plaintiffs unless they released him from all potential liability.

Plaintiffs sued defendant in November 2009 for causes of action including breach of contract and fraud. They alleged defendant breached the purchase agreement by “failing to pay the minimum amount owed under the Agreement to Plaintiffs upon sale of the Property,” causing damages of “at least \$275,000.” They alleged he committed fraud by misrepresenting his “desire[] to refinance the property in order to obtain a more favorable interest rate and to complete a few minor repairs to the property. These representations were false in that Defendant[] obtained financing believed to be in excess of \$130,000 without informing Plaintiffs,” causing damages “believed to exceed \$130,000.”

After a bench trial, the court found for plaintiffs on the breach of contract and fraud causes of action. It found “[t]he intent of the parties seems clear” — “everyone thought of this transaction and conveyance of the Fernglen property . . . as a sale from [plaintiffs] to [defendant].” “The parties expected to be made whole and perhaps make an additional profit via the sale of this house. The defendant clearly had such an expectation. [¶] [Plaintiffs] wanted the home sold and fully expected to receive the entirety of the sale price. If additional profits were forthcoming, they would have received 25%. The grant deed was executed in an unusual manner, however, the Court determines this was done to protect the interest of the remaining balance of the agreed-upon sale price. They wanted the home repaired prior to sale and the defendant was only able to purchase the home with their assistance. He represented he could make all the repairs in a timely manner and agreed to pay them the balance of the purchase price upon the sale. [¶] The defendant, in his own words, testified more than once that his view of the \$275,000.00 was that it was a loan.”

The court rejected defendant’s claim the transaction created a “partnership, or a joint venture” because “this decision turns more on testimony and credibility than a cold reading of the documents.” And “defendant does not do well in any area of his testimony. The Court finds him not credible.” In contrast, the court found plaintiffs and

their daughter “very credible witnesses” and it “resolve[d] any conflicts in the evidence in their favor.”

Finally, the court precluded any double recovery. “The Court finds for the plaintiff on the complaint and awards damages of \$275,000.00, the amount the defendant agreed to pay when the house sold. The Court notes the plaintiff[s] would be entitled to the amounts received pursuant to [defendant’s] fraudulent actions in obtaining the refinance and additional amounts for paying his personal line of credit and unjustified expenses billed for repairs, however, those amounts would be secondary and less than the \$275,000.00. [¶] Consequently, the judgment is for \$275,000.00.”

After much briefing by the parties as to the form of the judgment, the court entered judgment “in favor of plaintiffs on their breach of contract and fraud claims with damages awarded to Plaintiffs in the amount of \$275,000.” The court also awarded over \$88,000 to plaintiffs in prejudgment interest.

DISCUSSION

Plaintiffs Are Entitled to Judgment on their Contract Cause of Action

Defendant contends the court misconstrued the contract as a sale agreement. He asserts its plain terms created a joint venture or partnership whereby the parties would share all profits or any losses. He claims the court wrongly admitted plaintiffs’ uncommunicated subjective understanding of the deal. Moreover, he claims plaintiffs’ testimony was insufficient to show they loaned \$275,000 to defendant, or that defendant agreed to repay their \$275,000 first when he resold the house.

These contentions miss the point. The judgment does not turn on whether the basic nature of the transaction was a “straight sale,” joint venture, or partnership. The judgment turns on whether defendant promised to pay \$275,000 to plaintiffs upon the

resale of the house. He might have done so regardless of how the transaction was otherwise structured.

And while defendant decries the court's reliance on plaintiffs' testimony, their entitlement to \$275,000 is apparent on the face of the contract. "[C]ourts attempt to interpret the parties' intentions from the writing alone, if possible." (*Abers v. Rounsavell* (2010) 189 Cal.App.4th 348, 356.) Here, the plain language of the contract provides: **"Upon the resale of said property, the funds will be distributed as listed below.** [¶] 1) Howard and Betty Thomas will receive Two Hundred Seventy Five Thousand Dollars, \$275,00[0].00." Once the house was resold in January 2008 for \$680,000, plaintiffs were entitled to \$275,000. Defendant was obligated to pay that amount to them at that time. That is what the contract says. None of plaintiffs' testimony is needed to reach this conclusion.

Even if the court properly turned to extrinsic evidence, the record supports the judgment. "'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' 'The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent . . .'" (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1356, fn. omitted.) Here, plaintiffs' "very credible witnesses" testified defendant told them that when he resold the house, he would repay plaintiffs first. Howard Thomas testified: "Q: Why was it \$275,000 first [in the contract]? [¶] A: Because that's the first amount that [defendant] agreed to pay regarding this property. [¶] In other words, that was the balance of the purchase price. [¶] Q: So it's your understanding that the listed items here are listed in the order that they're supposed to be paid out? [¶] A: Absolutely. [¶] Q: And on what do you base that understanding? [¶] A: Because that's our agreement. We discussed that" Wendy Thomas testified similarly: "Q: And what was the purpose of that? Why did [defendant] agree to pay 275? [¶] A: Because he was borrowing 275 from my parents.

[¶] Q: Did you have any communications with [defendant] about the order of payment?

[¶] A: Yes. Q: What did he tell you? [¶] A: He agreed to pay my parents first”

Defendant complains this interpretation of the contract renders the deal unconscionable, impossible, impracticable, and frustrated. But he failed to allege these affirmative defenses in his answer. ““A party who fails to plead affirmative defenses waives them.”” (*Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 813.) And it is “the general rule that new issues cannot be raised for the first time on appeal.” (*Ibid.*) In any event, defendant retained the benefit of the deal’s potential upside. If he had renovated the house as promised and resold it for more than \$825,000 (the \$725,000 purchase price plus his \$100,000 renovation budget), he would have “receive[d] Seventy Five Percent, (75%) of all profits”

“[U]nconscionability is determined as of the time the contract was entered into, not in light of subsequent events. [Citation.] As one court noted, ‘[i]t is not the province of the courts to scrutinize all contracts with a paternalistic attitude and summarily conclude that they are partially or totally unenforceable merely because an aggrieved party believes that the contract has subsequently proved to be unfair or less beneficial than anticipated.’” (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1324.) ““If a party expressly undertakes to do a thing lawful in itself, and not necessarily impossible under all the circumstances, and does not do it, he must make compensation in damages, though the performance was rendered impracticable, or even impossible, by some unforeseen cause for which no provision is made and over which he had no control, but against which he might have provided in his contract.”” (*Kennedy v. Reece* (1964) 225 Cal.App.2d 717, 725.) If defendant wanted the deal to be conditioned upon resale to the prospective buyers for \$950,000 — or upon any resale for more than \$825,000 — he could have expressly contracted for that.

Plaintiffs Are Entitled to Judgment on their Fraud Cause of Action

Defendant contends the judgment on the fraud cause of action cannot stand because plaintiffs failed to show any damages. He notes the court did not determine any specific portion of the \$275,000 in compensatory damages was attributable to the fraud. And he asserts the fraud judgment must be reversed unless plaintiffs can show damages above and beyond the \$275,000 that can also be attributed to the breach of contract.

Defendant denies invoking the “election of remedies” doctrine preventing double recovery on inconsistent theories, but that is what his cited cases apply. (See, e.g., *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1159 [“[r]egardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence”]; *Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 337 [jury cannot “award damages under both contract and tort theories”]; *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 564 [“recovery could not be twice had simply because the facts would support recovery upon either [the contract or fraud] theory”]; *Pugh v. See’s Candies, Inc.* (1988) 203 Cal.App.3d 743, 760, fn. 13 [“plaintiff asserting both a contract and tort theory arising from the same factual setting cannot recover damages under both theories”]; *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 995 (*Walker*) [plaintiff cannot recover the “same damages” on “different theories”].)

Election of remedies is merely “a specific application of the doctrine of equitable estoppel” which “rests on the rationale that when plaintiff has pursued a remedy which is inconsistent with an alternative remedy and thereby causes the defendant substantial prejudice, plaintiff should be estopped from pursuing the alternative remedy.” (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 137.) “A person should be entitled to change his alternative remedies until one of his inconsistent rights is vindicated by satisfaction of judgment or by

application of the doctrines of res judicata or estoppel.” (*Frazier v. Metropolitan Life Ins. Co.* (1985) 169 Cal.App.3d 90, 101.)

Here, defendant has shown no such prejudice from the fraud judgment. The court awarded only \$275,000 in compensatory damages. Defendant concedes that amount is warranted by plaintiffs’ contract claim. Plaintiffs will not receive any double recovery due to the fraud judgment. We may not reverse absent “a miscarriage of justice.” (Cal. Const., art. VI, § 13.)

In any event, the record supports the existence of fraud damages. Defendant misrepresented the refinancing of his original \$450,000 loan, and concealed his borrowing an extra \$134,000 against the house with a \$584,000 negative amortization loan. And then he incurred interest and penalties on that loan, bringing its total payoff amount up to approximately \$615,000. So when the house eventually resold in 2008 for \$680,000, there was only about \$65,000 available to (partially) repay plaintiffs, not accounting for escrow and broker fees. But if defendant had not duped plaintiffs into cooperating with the refinancing, there would have been approximately \$230,000 available to (partially) repay plaintiffs — the \$680,000 in sale proceeds minus \$450,000 to pay off defendant’s original loan, not accounting for escrow and broker fees. That is a difference of approximately \$165,000 that plaintiffs would have recovered in 2008, but for defendant’s fraud.¹ Plaintiff may not recover that \$165,000 in addition to the \$275,000 — the \$165,000 would have been applied in partial satisfaction of the \$275,000 defendant already owed plaintiffs. But it sufficiently supports the fraud judgment. (See *Walker, supra*, 84 Cal.App.3d at pp. 994-996 [finding substantial evidence of fraud, but

¹ Defendant may not contend for the first time on appeal that the damage award was excessive. “A failure to timely move for a new trial ordinarily precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate, whether the case was tried by a jury or by the court.” (*Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719.)

modifying judgment to prevent double recovery because contract damages fully compensated plaintiff].)

DISPOSITION

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

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.