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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HELEN LEE et al.,

Plaintiffs and Respondents,

v.

DAVID NGUYEN,

Defendant and Appellant.

G045838

(Super. Ct. No. 30-2010-00335600)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frederick P. Horn, Judge. Reversed.

Law Office of Jon A. Dieringer and Jon Dieringer for Defendant and Appellant.

June Babiracki Barlow and Neil Kalin for California Association of Realtors as Amicus Curiae on behalf of Defendant and Appellant.

Hochfelsen & Kani and Steven I. Hochfelsen for Plaintiffs and Respondents.

Defendant David Nguyen appeals from a slightly more than \$235,000 judgment in favor of plaintiffs Helen Lee and Winston Chen. Nguyen, a real estate agent, represented plaintiffs as purchasers of real property who lost their purchase price when the Nevada Attorney General's office seized the balances in the escrow company's trust accounts, including plaintiffs' funds. He raises several arguments, but primarily that plaintiffs did not prove proximate cause. He also claims the court erred in failing to issue a statement of decision and denying his motion for judgment, relies on plaintiffs' lack of credibility, and challenges the judgment on public policy grounds. We agree there was insufficient evidence of proximate cause and reverse on that basis.

#### FACTS AND PROCEDURAL HISTORY

Plaintiffs retained the services of defendant to assist them in their purchase of bank-owned real property. Defendant ultimately presented a piece of property to plaintiffs, who agreed to purchase it for an all cash price of \$235,000, and, on defendant's advice, when escrow opened, deposited the entire purchase price. There was testimony this was not the norm in the industry. Five days after escrow was opened, the Attorney General for the State of Nevada executed a search warrant on the escrow company and seized its property, including the trust account holding plaintiffs' deposit.

Plaintiffs' attempt to recover their money from the Attorney General was unsuccessful and remains so. Plaintiffs then sued defendant, among others, for negligence, negligent misrepresentation, and conspiracy to defraud. After trial the court found plaintiffs proved all elements of their claims and awarded them \$235,587 against defendant and his codefendants jointly and severally.

Additional facts are set out in the discussion.

## DISCUSSION

Two of plaintiffs' three causes of action against defendant are negligent misrepresentation and conspiracy to commit fraud, in reality a claim for fraud because there is no cause of action for civil conspiracy. (*Moran v. Endres* (2006) 135 Cal.App.4th 952, 954-955.) To prevail on such a theory a plaintiff must prove an actual tort, in this case, fraud. (*Ibid.*)

“““The elements of fraud . . . are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.”” [Citation.] To recover for fraud, the plaintiff must prove “detriment proximately caused” by the defendant’s tortious conduct. [Citation.] Deception without resulting loss is not actionable fraud. [Citation.] “Whatever form it takes, the injury or damage must not only be distinctly alleged but *its causal connection with the reliance on the representation must be shown.*” [Citations.] ‘Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty.’ [Citation.]” (*Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364, italics added.)

Although scienter and intent are not elements of negligent misrepresentation, plaintiffs must still prove resulting damages. (*Goehring v. Chapman University, supra*, 121 Cal.App.4th at p. 364.) Plaintiffs’ third cause of action for negligence likewise requires proof of proximate cause. (*Cyr v. McGovran* (2012) 206 Cal.App.4th 645, 651.)

Defendant challenges the court’s finding as to proximate cause, claiming it conflated the elements of reliance and causation. As noted by plaintiffs, we decide this argument using the substantial evidence standard of review. That means we look at the entire record, resolve all conflicts and indulge all inferences in favor of the judgment,

without reweighing evidence or credibility. (*Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1251-1252.)

Plaintiffs include a laundry list of defendant's intentional and negligent misrepresentations and omissions of fact: He falsely told them the property was owned by a bank and part of a multi-property sale, what the parties refer to as a "bulk sale"; he advised that the woman he negotiated with on behalf of the seller was a real estate agent acting on their behalf when in fact she was not; he had plaintiffs sign a blank purchase contract, filling in the information at a later date; and he did not inform plaintiffs they should only put a "good faith deposit" into escrow but "pressured" them into depositing the full amount of the purchase price. And all of these allegations are supported by substantial evidence, notwithstanding defendant's claims to the contrary.

We are not persuaded by his argument plaintiffs were not credible. We do not evaluate credibility. That is the province of the trier of fact (*Fuentes v. AutoZone, Inc.* (2011) 200 Cal.App.4th 1221, 1233), and not only did the trial judge find plaintiff Helen Lee "very credible," he found defendant's testimony "demonstrated a complete lack of candor," especially his insistence "he was not acting as plaintiffs' agent."

But despite multiple record references to the evidence substantiating the misrepresentations, plaintiffs direct us to only one piece of testimony about their reliance, that is, that they would not have entered into the transaction if they had known it was part of a bulk sale. In its decision the court referred to this and also testimony they would have passed on the purchase had they known the seller's representative was not an agent. And the court concluded that defendant's misrepresentations, and those of the codefendants, caused plaintiffs to enter into the purchase "and inferentially the reason his money was lost."

But the law is clear that even "[a]ssuming . . . a claimant's reliance on the actionable misrepresentation, no liability attaches if the damages sustained were otherwise inevitable or due to *unrelated causes*.' [Citation.]" (*Goehring v. Chapman*

*University, supra*, 121 Cal.App.4th at p. 365.) “[I]f damages do not flow from the [fraud], but rather from some other extrinsic factor, the award of damages [is] improper.” (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1166.) And this was not a reasonable inference for the court to draw.

The same is true for the negligent misrepresentation cause of action. Damages do not flow from a defendant’s act if there is “[a] superseding cause[, that] is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.” [Citation.]” (*Brewer v. Teano* (1995) 40 Cal.App.4th 1024, 1031.) In *Brewer*, as a result of his reckless driving, the defendant hit the plaintiff’s car several times. Because he was afraid of what the defendant might do if he stopped, the plaintiff left the scene of the accident. As a result he was arrested and prosecuted for hit and run, but ultimately acquitted. He then filed the action against the defendant, based on his negligent driving, for the damages resulting from his arrest and prosecution. The court ruled the arrest and prosecution were superseding causes, relieving the defendant from liability. (*Id.* at pp. 1027, 1037.)

In our case, likewise, none of defendant’s misrepresentations, omissions, or negligent acts are the cause of plaintiffs’ damages. Plaintiffs’ agreement to purchase the property and the deposit of money into the escrow as a result of the misrepresentations satisfy the reliance element only. Damages were caused by the seizure of the escrow funds by the Nevada Attorney General. As stated in *Goehring*, not only must there be reliance, there must be a causal connection between the reliance and the damages. (*Goehring v. Chapman University, supra*, 121 Cal.App.4th 353 at p. 364.) Here there was none. Whether or not, for example, the contract was blank when presented to plaintiffs for signature, had nothing to do with the completely unrelated act by the Attorney General. In other words, the harm suffered by the plaintiffs was “‘different in kind’” from that which could have been contemplated by defendant’s negligent acts.

(*Brewer v. Teano, supra*, 40 Cal.App.4th at p. 1031.) Indeed, had it not seized the escrow funds, nothing in the record shows the transaction would not have closed and plaintiffs would have acquired the property. Thus, as a matter of law the Attorney General's action was both an unrelated and a superseding cause, relieving defendant from liability.

Despite what the trial court and we might think of defendant's conduct in the transaction, it did not cause plaintiffs' damages under any of their three causes of action, and, notwithstanding the unfortunate results, we must reverse.

Because we decide the case on this basis we need not determine the other issues raised.

#### DISPOSITION

The judgment is reversed. Appellant is entitled to costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.