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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

EXIR CO., INC.,

Plaintiff and Appellant,

v.

CVC REAL ESTATE GROUP, INC.,

Defendant and Respondent.

G046284

(Super. Ct. No. 30-2008-00111454)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed.

John K. Saur for Plaintiff and Appellant.

Livingston Law Firm, Renée Welze Livingston and Crystal L. Van Der Putten for Defendant and Respondent.

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Plaintiff Exir Co., Inc. (Exir) appeals from a summary judgment entered in favor of CVC Real Estate Group, Inc. (CVC). Exir, as the buyer of residential real property in Silverado, California, claims the court wrongfully excluded evidence that would have shown real estate broker CVC, as the seller's broker, failed to perform its duty to make a competent visual inspection of the property, and breached its duty to disclose to Exir that there were facts materially affecting the desirability or value of the property. In particular, Exir claims that CVC failed to disclose there were unabated weeds on the property, and that a fire destroyed the residence less than three weeks after close of escrow because of the weeds.

The summary judgment is affirmed. The undisputed facts show that CVC neither failed to inspect the property nor failed to make a disclosure as required by law. CVC was not required to disclose any weeds on the property, inasmuch as they would have been readily observable by Exir as the purchaser. (*Holmes v. Summer* (2010) 188 Cal.App.4th 1510, 1518-1520.) Furthermore, the excluded evidence would not have shown that there were unabated weeds on the property at the time of disclosure in any event.

## I

### FACTS

#### A. *Undisputed Facts:*

Abraham Mourshaki is the president of Exir, a closely held corporation. The shares of the corporation are owned entirely by Mourshaki's immediate family. Mourshaki, an engineer by training, had been involved in real estate development for 16 years by the time Exir was formed in 2005. Indeed, before buying the property in question, Exir had purchased five other properties in Silverado.

Exir purchased the property in question "as-is" from Western Financial Savings Bank. CVC was the real estate broker representing the bank. On or about

September 16, 2007, Corey Rhodes, the president and real estate broker of CVC, inspected the property and prepared an inspection report. The report did not make any mention of unabated weeds on the property. CVC provided the report to Exir's real estate agent no later than September 16, 2007.

Mourshaki visited the property several times before the close of escrow. However, he did not observe any dry brush or weeds near any of the structures on the property. Before the fire, he did not perceive any weeds as a hazard in need of attention.

The escrow closed on October 5, 2007. On or about October 21, 2007, a fire was set by an arsonist. The fire burned over 28,000 acres and destroyed 14 homes, including the one belonging to Exir.

*B. Litigation:*

Exir filed a first amended complaint against CVC and others seeking damages arising out of a fire that burned Exir's newly purchased property in Silverado. Exir alleged that the fire "was enabled to progress directly to, ignite, and destroy the Property because of, and only because of, the fuel pathway provided to the fire by the continuing existence of the unabated weeds, which the [seller of the property] had been ordered, pursuant to applicable regulations, to remove, and of which C.V.C. . . . [was] aware or should have been aware, given [its] duty to make a diligent visual inspection and disclose material facts (Code of Civil Procedure section 2079, et. seq.)."

Exir further alleged that CVC had both statutory and common law duties to inspect the property and to disclose to Exir all facts materially affecting the value or desirability of the property. Exir claimed CVC breached its duty by either failing to make the inspection or failing to inform Exir of the existing fire hazard created by unabated weeds. It sought damages exceeding \$1,500,000, on theories of negligence and negligence per se.

CVC filed a motion for summary judgment contending, inter alia, that it had conducted the required property investigation, did not observe any weeds on the property that materially affected its value or desirability, prepared the required disclosure, and, approximately three weeks before close of escrow, provided the disclosure to Exir's real estate agent. CVC further asserted that it did not, in any event, have a duty to disclose open and obvious conditions, such as weeds.

In its memorandum of points and authorities in opposition to CVC's motion, Exir asserted: "Any reasonably competent and diligent visual inspection of the property, made by an appropriately knowledgeable real estate broker, would have revealed to [CVC] . . . that there was a swath of dry brush, approximately 80 feet long and about 15 feet wide, running in a more or less straight line from the rim of a nearby brush filled box canyon, down a gentle slope to the house. The terminus of this path of dry brush and weeds spread out where it abutted a wooden gazebo which was directly adjacent to the wooden porch connected to the house itself. . . . In the event, the fire followed this avenue of fuel to the home's gazebo, which, in turn, ignited the porch, leading to the destruction of the entire residence."

The court granted CVC's motion for summary judgment, holding, inter alia, that (1) CVC had met its burden as the moving party because there was no evidence to show it had breached a duty to Exir, and (2) the burden then shifted to Exir as the opposing party, but Exir failed to produce evidence to rebut CVC's showing. Exir appeals from the summary judgment entered against it.

## II

### DISCUSSION

#### *A. Summary Judgment Review:*

"Under summary judgment law, any party to an action, whether plaintiff or defendant, 'may move' the court 'for summary judgment' in his [or her] favor on a cause

of action . . . or defense (Code Civ. Proc., § 437c, subd. (a))—a plaintiff ‘contend[ing]. . . that there is no defense to the action,’ a defendant ‘contend[ing] that the action has no merit’ (*ibid.*). The court must ‘grant[]’ the ‘motion’ ‘if all the papers submitted show’ that ‘there is no triable issue as to any material fact’ (*id.*, § 437c, subd. (c))—that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law [citations]—and that the ‘moving party is entitled to a judgment as a matter of law’ (Code Civ. Proc., § 437c, subd. (c)).” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

“[I]n moving for summary judgment, a ‘defendant . . . has met’ his [or her] ‘burden of showing that a cause of action has no merit if’ he [or she] ‘has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. . . .’ (Code Civ. Proc., § 437c, subd. (o)(2).)”<sup>1</sup> (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.)

On review of a summary judgment, we “examine the record de novo and independently determine whether [the] decision is correct. [Citation.]” (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1149.)

## *B. Analysis:*

### *(1) Duty of care—*

Exir relies on Civil Code section 2079, which provides in pertinent part: “(a) It is the duty of a real estate broker or salesperson, . . . to a prospective purchaser of residential real property . . . , to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all

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<sup>1</sup> See now Code of Civil Procedure section 437c, subdivision (p)(2).

facts materially affecting the value or desirability of the property that an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer . . . .” (Civ. Code, § 2079, subd. (a).)

This statute does not relieve the buyer of a duty to examine the property himself or herself, however. Civil Code section 2079.5 provides: “Nothing in this article relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself, including those facts which are known to or within the diligent attention and observation of the buyer or prospective buyer.” (Civ. Code, § 2079.5; *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1079; see also Civ. Code, § 2079.16.)

As this court stated in *Holmes v. Summer, supra*, 188 Cal.App.4th 1510, “It is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property *which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer*, the seller is under a duty to disclose them to the buyer. [Citations.]’ [Citations.]” (*Id.* at pp. 1518-1519, italics added.) “When the seller’s real estate agent or broker is also aware of such facts, ‘he [or she] is under the same duty of disclosure.’ [Citation.] A real estate agent or broker may be liable ‘for mere nondisclosure since his [or her] conduct in the transaction *amounts to a representation of the nonexistence of the facts which he has failed to disclose* [citation].’ [Citation.]” (*Id.* at p. 1519.) “[T]he main purposes of the rule . . . ‘are to protect the buyer from the unethical broker and seller and to insure that the buyer is provided sufficient accurate information to make an informed decision whether to purchase.’ [Citation.]” (*Ibid.*) For liability based on the nondisclosure of information to lie, “the information in question must be unknown to, or outside ‘the diligent attention and observation of the buyer . . . .’ [Citations.]” (*Id.* at p. 1520.)

Here, Exir conceded, in its response to CVC's separate statement of undisputed material facts, that CVC had conducted an investigation of the property, prepared a disclosure, and delivered the disclosure to Exir's own real estate agent. However, in opposing the motion for summary judgment, Exir asserted that CVC should have observed and disclosed unabated weeds that were present on the property, but failed to do so. We hold that this contention failed to raise a triable issue of material fact precluding summary judgment, for a couple of reasons.

First, one can hardly maintain that the existence of unabated weeds on the property was outside of the scope of Mourshaki's "diligent attention and observation." (Civ. Code, § 2079.5; *Holmes v. Summer*, *supra*, 188 Cal.App.4th at p. 1518.) Mourshaki had every opportunity to view the property and observe whether there were unabated weeds on it, just as he had the opportunity to observe that the property was located in what Exir now describes as a "rural and rugged canyon area[]" and/or bordered upon what Exir presently characterizes as "a brush filled box canyon." Mourshaki did in fact view the property, several times, and never noticed unabated weeds thereon. However, Exir speculates that there may have been weeds that Mourshaki did not notice but that CVC should have noticed. Yet the burden was on Mourshaki (as the president of purchaser Exir) to notice matters within his diligent attention and observation. "[A] buyer is held to be aware of obvious and patent conditions" (*Furla v. Jon Douglas Co.*, *supra*, 65 Cal.App.4th at p. 1079), and in this case, a purported 80-foot swath of unabated weeds would be an obvious and patent condition.

Exir disagrees. Citing *Furla v. Jon Douglas Co.*, *supra*, 65 Cal.App.4th 1069, it argues that whether an 80-foot swath of unabated weeds should be characterized as an obvious and patent condition within the buyer's diligent attention and observation is a question of fact for the jury. However, the issue in *Furla v. Jon Douglas Co.*, *supra*, 65 Cal.App.4th 1069, was a discrepancy in the square footage of a dwelling. The court

stated: “A jury might reasonably conclude that plaintiff was justified in relying on defendant’s representation of the square footage, that the truth was not obvious and patent to plaintiff and could be determined only by an expert measurement which plaintiff was not required to hire in order to discover defendants’ misrepresentations.” (*Id.* at p. 1079.)

The case before us, however, does not involve an issue of justifiable reliance upon a representation. It also does not involve a matter requiring expert analysis or opinion. Rather, in this case, we have only a matter of openly visible weeds. Any weeds on the property would have been as readily observable by the purchaser of the property as by a real estate broker and there is no special expertise required to observe weeds and to comprehend them as such or to realize that dry brush burns. Although breach of duty, like causation, is ordinarily a question of fact to be determined by the jury, the determination can be removed from the jury and treated as a question of law where reasonable men and women cannot dispute the point. (*Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 207.)

We turn now to the second reason why the failure to disclose weeds on the property did not give rise to a triable issue of material fact precluding summary judgment. It is undisputed that CVC provided its disclosure no later than September 16, 2007. The fire was started by an arsonist on or about October 21, 2007. Even if there were unabated weeds on the property on October 21, 2007 that contributed to the spread of the fire to the dwelling on Exir’s property, it would not necessarily follow that there were unabated weeds on the property when CVC made its inspection of the property and disclosure to Exir in September 2007. For that matter, even if there were unabated weeds on the property as of October 5, 2007 when escrow closed, Exir would have had time to take note of the weeds and eliminate them before the fire started.

Inasmuch as we conclude that CVC had no duty to disclose weeds on the property<sup>2</sup>, we could end our opinion here. However, we choose to briefly respond to Exir’s primary arguments on appeal.

(2) *Exclusion of evidence Official Incident Report*—

Exir’s appeal is based on the trial court’s exclusion of evidence. Exir claims that the admissibility of an Orange County Fire Authority Official Incident Report “is the crux of this appeal.”

In opposition to CVC’s motion for summary judgment, Exir provided Mourshaki’s declaration. A copy of an Orange County Fire Authority Official Incident Report was attached to that declaration as exhibit A. Exhibit A consisted of four unnumbered pages. The first three pages of exhibit A contained data concerning an October 21, 2007 incident on property located at 28522 Williams Canyon Road, Silverado, California 92676 purportedly owned by Mourshaki. It described the cause of ignition as “Exposure fire.” It listed wind, low fuel moisture or drought, and “Urban-Wildland Interface Area” as fire suppression factors. In addition to being unpaginated, the document was unauthenticated and it did not identify the date of preparation or the preparer. However, Maura Monk signed as the person who “[r]eleased” the copy.

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<sup>2</sup> In its reply brief, Exir contends that the trial court did not rely on this ground, so if this court does so rely, we should remand the matter to give the trial court an opportunity to consider the point. We disagree. CVC clearly asserted in its motion for summary judgment that it had no duty to disclose open and obvious weeds to Exir. Furthermore, in its order granting the motion, the court stated there was no evidence “CVC breached any duty it *may have* owed Exir.” (Italics added.) This may be construed as an indication CVC owed no duty of the type asserted at all. To the extent the language is construed to mean that CVC had a duty of disclosure, but there was no evidence to show the duty was breached, we may still affirm on the ground there was no duty. On appeal, a summary “judgment may be affirmed on any correct legal theory provided the opposing party had the opportunity to address it below. [Citation.]” (*Vallely Investments v. BancAmerica Commercial Corp.* (2001) 88 Cal.App.4th 816, 821.) Exir not only had the opportunity, it addressed the issue in its opposition to the motion. Similarly, both parties addressed the issue in their briefing on appeal. (Cf. Code Civ. Proc., § 437c, subd. (m)(2).)

Following the third page, that bore the signature of Monk, was an additional page also labeled “Official Incident Report.” The last four sentences of that page stated: “On February 7, 2008, I visited the site and concluded that the most probable cause of the fire spread was the large amount of vegetation in direct contact with the structure. The home owner indicated that the home had wood siding and an open eve porch. The house sits directly above a box canyon. The large amount of fuel below the home contributed to the fire spread.”

That additional page was neither signed nor dated. And, unlike the three-page report released by Monk, the additional page contained no signature at all. However, a copy of the business card of Orange County Fire Authority Fire Captain David Spencer was superimposed on the lower half of the page.

In his declaration, Mourshaki stated: “In January of 2008, an Orange County Fire Authority investigator arranged to meet me at the site. He identified himself as David Spencer and gave me his card, as shown on Exhibit A hereto.” However, Mourshaki did not declare that he had any information concerning either the author of exhibit A, whether Captain Spencer or someone else, or the time of preparation of exhibit A.

On appeal, Exir contends the court erred in excluding the four pages of the Official Incident Report, because those pages were admissible under Evidence Code section 1280.<sup>3</sup> We need not address whether those pages would have been admissible

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<sup>3</sup> Evidence Code section 1280 provides: “Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.”

under Evidence Code section 1280, for, as CVC asserted in its objections to the evidence, those pages were inadmissible for a number of reasons, including relevance.

Even if Captain Spencer had prepared the additional page of the Official Incident Report and had opined “that the most probable cause of the fire spread was the large amount of vegetation in direct contact with the structure,” this would have no tendency in reason to prove that there were unabated weeds on the property on the date of CVC’s inspection in September 2007. The Official Incident Report did not specify that the vegetation in question on the date of the fire consisted of weeds, and even if there were weeds in contact with the house on the date of the fire, that does not mean they were there in September 2007.

*(3) Weed abatement notice—*

We will put to rest another point Exir raises, although, again, we need not. Under the topic heading “THE ADMISSIBILITY OF THE OFFICIAL INCIDENT REPORT,” Exir also mentions exhibit B to Mourshaki’s declaration—a weed abatement notice dated March 13, 2007. We need not address that exhibit because, as stated previously, CVC had no duty to notify Exir of any readily observable weeds on the property, and also because Exir has failed to raise this point under a separate topic heading. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Conservatorship of Hume* (2006) 139 Cal.App.4th 393, 395, fn. 2; *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4.)

Nonetheless, we can dispose of the exhibit fairly briefly. The weed abatement notice from the County of Orange Resources & Development Management Department, addressed to the “Property Owner” of the property identified by assessor’s parcel number 105-300-19, stated: “The Resources & Development Management Department will be conducting annual weed abatement inspection and cleaning beginning April 17, 2007 and throughout the year on the property described by the above Assessor’s

Parcel Number. . . . *Your property may not be in violation at the time of receiving this notice, but please check* and maintain the condition of your property throughout the year. [¶] You are hereby notified . . . to remove any vegetation, litter, or other flammable material from the above-mentioned property by April 17, 2007. Property with hazardous weeds and vegetation not cleared and maintained is subject to being cleared by County-contracted crews after April 17, 2007.” (Italics added; boldface omitted.) The reverse side of the form letter stated that the Orange County Board of Supervisors had passed a resolution on March 13, 2007 concerning the abatement of weeds growing upon property located on certain streets.

As CVC points out, the front page of the notice makes clear that there may not actually have been any weeds on the property at the time of receipt of notice. But Exir construes the language on the back of the notice to be an indication that there were in fact unabated weeds on the property on the date of the resolution. It does not matter either way. Evidence that there were unabated weeds on the property on March 13, 2007, that would be cleared by the county beginning April 17, 2007 unless earlier cleared by the property owner, does not show that there were unabated weeds on the property on or about September 16, 2007, when CVC conducted its inspection and prepared its disclosure. As the trial court stated, the weed abatement notice was “too remote in time to establish the property condition when escrow closed seven months later . . . .” In other words, even if CVC had owed Exir a duty to disclose weeds on the property, the weed abatement notice did not raise a triable issue of material fact to show that there were unabated weeds on the property either when CVC made its disclosure or when escrow closed.

(4) *Mourshaki’s declaration*—

As a final point, we also need not address Exir’s various comments about portions of the body of Mourshaki’s declaration that were excluded from evidence, where

those comments are strewn about the opening brief without separate topic headings or subheadings, and where they are not supported by legal argument and/or citation to legal authority. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Conservatorship of Hume*, *supra*, 139 Cal.App.4th at p. 395, fn. 2; *Opdyk v. California Horse Racing Bd.*, *supra*, 34 Cal.App.4th at pp. 1830-1831, fn. 4; *In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375, 1392-1393; *Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 109.)

We observe that Exir addresses the evidentiary rulings somewhat more cogently in its reply brief. However, almost every point remains unsupported by legal authority. The exception pertains to CVC's objection to paragraph 10 of Mourshaki's declaration, where Mourshaki stated that he had asked Captain Spencer whether an official report would be made. According to Mourshaki, "[Captain Spencer] said 'yes' and that, because it concerned my property, I could get it free of charge." CVC objected to the quoted sentence on the basis of hearsay.

In its reply brief, Exir contends the quoted sentence is not hearsay because it was offered only to provide the necessary foundation for the Evidence Code section 1280 exception to the hearsay rule with respect to the Official Incident Report. It matters not. As we have already stated, the Official Incident Report was not relevant to show whether there were unabated weeds on the property at the date of CVC's disclosure.

(5) *Conclusion*—

In sum, CVC met its burden of showing the cause of action against it had no merit by establishing that it had no duty to disclose unabated weeds on the property to Exir and that, even if it had such a duty, there was no evidence of unabated weeds on the property at the relevant time. Having met its burden, the burden then shifted to Exir to raise a triable issue of material fact with respect to that cause of action. Having failed to meet its burden, summary judgment was properly granted. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.)

III

DISPOSITION

The judgment is affirmed. CVC Real Estate Group, Inc. shall recover its costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, ACTING P. J.

FYBEL, J.