

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HOWARD KAVOUSSI et al.,

Plaintiffs and Respondents,

v.

BERND MOOS,

Defendant and Appellant.

G046894

(Super. Ct. No. 30-2009-00126207)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, B. Tam Nomoto Schumann, Judge. Affirmed.

Law Offices of William J. Kopeny and William J. Kopeny for Defendant and Appellant.

Corbett, Steelman & Specter, Ken E. Steelman and Susan J. Ormsby for Plaintiffs and Respondents.

*

*

*

Defendant Bernd Moos appeals from a \$3 million judgment in favor of plaintiffs Howard Kavoussi (Howard), individually and as administrator of the estate of Key Kavoussi, and Iran Kavoussi (plaintiffs) for fraud. He contends there was insufficient evidence to show causation, the complaint was barred by the statute of limitations, and the trial judge was biased. We see no error and affirm.

FACTS

Plaintiffs owned the stock of Greater Pacific Health Maintenance Organization (Greater Pacific), a health maintenance organization. Greater Pacific held a license (License) to operate issued pursuant to the Knox-Keene Health Care Service Plan Act of 1975 (Health & Saf. Code, § 1340 et seq.; Knox-Keene Act), and also had all other necessary required certificates of deposit. Harold Kavoussi (Harold), Howard's brother, operated the business. Greater Pacific was well run with thousands of subscribers and without any regulatory violations.

In late 1998, plaintiffs were approached by James Graf, president of American Health Systems, Inc. (American Health), who wished to purchase Greater Pacific. Plaintiffs tentatively agreed to sell the shares of Greater Pacific to American Health for \$3 million plus 2 million shares of American Health. Plaintiffs settled on this value in part because Knox-Keene Act licenses are no longer being issued and are difficult to purchase.

The parties were to enter into a Stock Purchase Agreement and American Health was to execute a Promissory Note (Note) for \$3 million. American Health was required to have the License transferred from Greater Pacific.

Graf was anxious to take over operations of Greater Pacific before the Department of Corporations approved the Stock Purchase Agreement and before the License was transferred. When plaintiffs balked at that, Graf suggested they enter into a

Management Agreement and a Certificate of Financial Guarantee (Guarantee)¹ that would guarantee payment. The Management Agreement provided that if American Health became insolvent or bankrupt or lost the License it would pay plaintiffs \$3 million, payment to be guaranteed by an irrevocable guarantee issued by Bancor, Inc. (Bancor), a purported Canadian corporation. The Certificate of Financial Guarantee (Guarantee), was executed by defendant, a resident of Canada and the ostensible vice-president of Bancor. The Guarantee stated that if American Health defaulted under the Note, within 15 days of notice of default Bancor would pay plaintiffs \$3 million.

Before consummating the sale defendant wrote to Howard on Bancor stationery and introduced himself as Bancor's vice-president, confirming Bancor would fund the purchase and issue the Guarantee. On the same day he wrote to Graf, transmitting a copy of the letter he had sent to Howard. The letter was on Bancor letterhead and showed defendant as Bancor's vice-president.

At about the same time Howard and Harold spoke to defendant. Defendant told the two men he had reviewed and was familiar with the Purchase Documents. During the conversation defendant represented to plaintiffs he was the vice-president of Bancor, which was guaranteeing the sale in the sum of \$3 million and which Bancor had sufficient funds to pay. Defendant agreed to provide Bancor's financial statements to Graf so he could forward them to plaintiffs. Graf then sent documents purporting to be Bancor's financial statements to plaintiffs. Defendant told them he had had a ten-year business relationship with Graf and that he was providing \$25 million to fund and guarantee other businesses Graf was involved with.

Plaintiffs relied on these representations and closed the sale. Plaintiffs would never have agreed to the Management Agreement or the premature turnover of operations without the Guarantee. American Health began operating Greater Pacific.

¹ The Stock Purchase Agreement, Management Agreement, Note, and Guarantee are collectively identified as the Purchase Documents.

But Graf and American Health failed to have the License transferred. Further, some of American Health's medical decisions were approved by unauthorized personnel. As a result the California Department of Corporations revoked the License in mid-1999.

When American Health failed to pay the \$3 million due, Bancor did not honor the Guarantee. Plaintiffs first telephoned and then wrote to Peter M. Leich of Sacks and Leich, counsel for defendant, seeking to have him make demand on defendant to pay under the guarantee. Bancor never made payment.

Thereafter, in 2002 plaintiffs contacted Christopher Thiesenhausen, a Canadian lawyer, to file suit to collect the amount due under the Note and Guarantee. Thiesenhausen counseled plaintiffs to file suit in California, which they did. Plaintiffs were unable to locate defendant but they obtained a default judgment against American Health, Bancor, and Graf in approximately 2004. In 2006 they engaged Thiesenhausen to collect on the judgment. He was unable to locate either Bancor or defendant. Plaintiffs' searches were likewise unsuccessful.

Toward the end of 2008, Thiesenhausen advised plaintiffs he had learned none of the Bancor addresses shown on the various letters defendant had sent to plaintiffs were valid. The address for Sacks and Leich was valid. But Thiesenhausen also learned those two lawyers had been disbarred two years earlier for fraud in connection with defendant. This was the first Thiesenhausen became aware of this information and that the transaction might have been "irregular." Thiesenhausen counseled plaintiffs to retain attorneys in California to deal with what might be a matter of fraud. Plaintiffs filed the instant action against defendant in July 2009, alleging causes of action for intentional and negligent misrepresentation.

Additional facts are set out in the discussion.

DISCUSSION

1. Substantial Evidence

Defendant contends there is insufficient evidence to show his misrepresentations caused plaintiffs' damages. When a party claims there is insufficient evidence we begin with the presumption the judgment is correct. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) On review of a judgment ““based upon a statement of decision following a bench trial, ‘any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]’ [Citation.]”” (*Axis Surplus Ins. Co v. Reinoso* (2012) 208 Cal.App.4th 181, 189.) We may not reweigh or resolve conflicts in the evidence or redetermine the credibility of witnesses. (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.) We liberally construe the court's findings of facts, whether express or implied. (*Ibid.*) Even the testimony of a single witness may be sufficient. (*Ibid.*)

Defendant proffers several theories to show there was insufficient evidence to support the judgment, none of which persuades. First he argues plaintiffs were damaged, not because of his misrepresentations but due to revocation of the License and Graf's violation of the law. This is contrary to the evidence.

Harold testified plaintiffs obtained and relied on the Guarantee for payment of \$3 million if American Health lost the License or was mismanaged. There is no way plaintiffs would have agreed to the Management Agreement or the early turnover of operations of Greater Pacific without the Guarantee. Additional evidence was contained in the Management Agreement, which specifically provided that if it was terminated or American Health lost the License, American Health would pay plaintiffs \$3 million. This payment was secured by an irrevocable guarantee of payment of that amount by Bancor. One of the elements of a fraud cause of action is damage due to the defendant's

misrepresentation. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255.) The evidence makes it clear and the trial court found plaintiffs would not have sold Greater Pacific to American Health without defendant's misrepresentations.

Defendant also maintains there is no evidence the License or any other asset of Greater Pacific was worth \$3 million. This argument fails for several reasons, but we need discuss only one. Plaintiffs testified the License was worth \$3 million. That is the price they put on it, that is the price American Health agreed to pay for it, and that is the price Bancor, based on defendant's misrepresentations, agreed to guarantee. The agreed price is the fair market value under these circumstances, and plaintiffs are entitled to recover that amount. "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." (Civ. Code, § 1709.)

The owner of property is qualified to testify as to its value and no expert testimony is required. (Cal. Law Revision Com. com., 29B pt. 3A West's Ann. Evid. Code (2009 ed.) foll. § 800, p. 3; *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 876.) The trier of fact determines the weight it will give to the evidence (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.*, *supra*, 157 Cal.App.4th at p. 876), and the trial court made it clear it gave the evidence substantial weight.

In a related claim, defendant argues that because plaintiffs did not transfer the stock of Greater Pacific, the transaction was never consummated and the Guarantee did not go into effect. But again this is contrary to the evidence. Payment under the Guarantee was not contingent upon transfer of stock, only upon the default of American Health.

Defendant's off-hand mention of an alleged double recovery is not sufficiently briefed, lacking reasoned legal arguments and supporting authority, and we

decline to address it. (*Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 165.)

Finally, attacking from another angle, defendant claims that, because plaintiffs originally sued American Health, Bancor, and Graf for breach of contract, they have waived their right to sue him for fraud. Preliminarily, we may consider this argument forfeited because it is not a substantial evidence claim and defendant failed to set it out under its own discrete heading, in violation of the rules of court. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

On the merits the claim still fails. Plaintiffs did not enter into a contract with defendant. Rather, he fraudulently induced plaintiffs to enter into the transaction with American Health. Plaintiffs have a discrete cause of action against defendant separate from that against American Health. Defendant's cursory references to claims for rescission and securities fraud are unclear and unpersuasive.

Within this argument defendant also includes the same misguided claim that there is insufficient evidence of a causal connection between his misrepresentations and plaintiffs' damages. We have already disposed of this claim and do not address it again.

2. *Statute of Limitations*

Defendant asserts plaintiffs' fraud causes of action are barred by the statute of limitations because the complaint was filed over 11 years after they relied on the misrepresentations and at least 10 years after plaintiffs were damaged.² But the statement

² In addition to this claim defendant focuses on an argument in the trial court that he had not sufficiently pleaded his statute of limitations affirmative defense and thus it was waived. The trial court did not base its ruling on that ground and we do not address it.

of decision correctly states the law that the dates on which the fraud was completed and the plaintiffs were damaged are not the same as the date plaintiffs actually discovered the fraud.

The limitations period for fraud and negligent misrepresentation is three years. (Code Civ. Proc., § 338, subd. (d).) “[T]he uniform California rule is that a limitations period dependent on discovery of the cause of action begins to run no later than the time the plaintiff learns, or should have learned, the facts essential to his claim.’ [Citation.]” (*Cleveland v. Internet Specialties West, Inc.* (2009) 171 Cal.App.4th 24, 31, italics omitted.)

Generally a victim of fraud does not have a duty of inquiry. (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1067.) ““Where no duty is imposed by law upon a person to make inquiry, and where under the circumstances ‘a prudent man’ would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery.” [Citations.]” (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 298, fn. 15.) Thus, plaintiffs had the right to rely on defendant’s misrepresentations that Bancor existed, was sufficiently funded, and would pay on the Note if American Health defaulted.

Defendant argues that, even without actual knowledge, plaintiffs were put on inquiry knowledge more than three years before filing the action. The statute of limitations does begin to run ““after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry’ [Citations.]” (*Cleveland v. Internet Specialties West, Inc.*, *supra*, 171 Cal.App.4th at p. 31.) But the court specifically found plaintiffs had no inquiry notice until late 2008, less than a year before they filed the complaint.

The statement of decision stated “the *first indication* that the [p]laintiffs had that something was ‘amiss’ occurred in late 2008.” (Italics added.) This was when

Thiesenhausen advised that every address on the letters sent by Graf to plaintiffs was invalid and defendant's lawyer had been disbarred in 2006 for fraud in connection with defendant.

Defendant sets out a list of "facts" he claims should have put plaintiffs on inquiry, but none of these persuades. First, defendant fails to provide record references, which we may treat as fatal to the argument. (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294.)

Second, even if we consider the "facts" on the merits, they do not show plaintiffs had inquiry notice. Many "facts" are directly related to the sale and Guarantee, upon which, as shown above, plaintiffs had the right to rely.

Defendant also refers, for example, to the loss of the License and Graf's default. But mismanagement of a business or breach of a contract does not necessarily suggest fraud may underlie the transaction. And the resulting first action against Bancor, Graf, and American Health provided no notice of fraud. Further that Graf went to prison has no bearing on defendant's conduct. And plaintiffs did not learn of Leich's disbarment until 2008. Defendant's claims his own "name was easily located on the [I]nternet" and governmental sources had information about Bancor are not in the record.

And contrary to defendant's claim, none of these "facts" "establish as a matter of law that [p]laintiffs were on notice." The argument is not supported by authority, which we may treat as a forfeiture of the claim. (*Benach v. County of Los Angeles, supra*, 149 Cal.App.4th at p. 852.) Further, "[w]hen the facts known to the plaintiff are susceptible to opposing inferences, the question of whether he has notice of circumstances sufficient to put a prudent man upon inquiry is a question of fact [citations]. On the other hand, when knowledge had by or imputed to plaintiff is such as to compel the conclusion that a prudent man would have suspected the fraud, the court may determine, as a matter of law, that there had been discovery [citations]." (*National Automobile & Cas. Ins. Co. v. Payne* (1968) 261 Cal.App.2d 403, 409.) Defendant has

not demonstrated this is a question of law. And the court found plaintiffs were not inquiry notice until 2008; the action was filed in 2009, well within the three-year limitations period.

Finally, “[w]hen an issue involving the statute of limitations has been tried, we review the record to determine whether substantial evidence supports the findings of the trier of fact. [Citations.]’ [Citation.]” (*People v. Petronella* (2013) 218 Cal.App.4th 945, 957.) The record contains facts to support the trial court’s findings. That there may be evidence to the contrary is of no moment. As noted above, we do not reweigh evidence.

3. *Judicial Bias*

Defendant’s final argument is that the judge was biased against him, based on her rulings as to his credibility versus that of Harold and Howard and two evidentiary rulings. This argument also lacks merit.

A judge may be disqualified based on bias. (Code Civ. Proc., §§ 170.1, subd. (a)(6)(A)(ii), 1703.) But the claim must be raised as soon as it becomes apparent and at least before the case is submitted. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.) Defendant points to nothing in the record showing he made any objection based on judicial bias. Because defendant did not object based on bias or avail himself of the statutory remedies, he has forfeited any right to raise this issue on appeal. (*Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1218.) But the argument fails even on the merits.

As to the relative credibility of the witnesses, the court made extensive findings in the statement of decision. It found defendant’s testimony was “evasive, contradictory and unsupported.” He was largely unable to recall anything about the purchase and sale or any interactions with plaintiffs, and defendant’s “demeanor and manner of testimony” caused the court to find him not credible. Adding to this was his

late production of documents just before trial, although they had been requested two years prior. In addition, the court treated defendant's testimony that the financial statements sent to plaintiffs were just "projections" as an admission they were false.

The court further found defendant's evidence generally "unpersuasive," although it did believe his testimony he knew Bancor did not exist even as he was holding himself out as its vice-president. His other testimony was contradictory and inconsistent with the documentary evidence.

In his brief defendant cites to three pieces of evidence he claims show he was credible. As noted above, we do not make credibility determinations. And the court's determination defendant lacked credibility is amply supported by the evidence it cites.

On the other hand, the court found the testimony of Harold and Howard credible, in particular noting it had "observe[d their] demeanor" and evaluated the substance of their testimony. Defendant complains this finding, when compared to the finding he was not at all credible, demonstrates judicial bias. He argues it is not possible all of plaintiffs' testimony could be true while all of his untrue. Au contraire. The findings illustrate the careful attention the court paid to the witnesses and the substance of their testimony. (See *Guardianship of L.V.* (2006) 136 Cal.App.4th 481, 500 ["An opinion formed by a judge as the result of a judicial hearing, even though it is adverse to a party, does not amount to bias"].)

The other basis for defendant's claim of judicial bias is two evidentiary rulings. First, on cross-examination of Harold, not a party to the action, defendant's lawyer referenced an \$8.1 million judgment against Harold, asking if it was for a fraudulent conveyance. In response to plaintiffs' relevancy objection, defendant's lawyer stated it showed "the family's pattern in substantial litigation having to do with fraud and breach of contract." The court sustained the objection.

Later, on cross-examination of defendant, plaintiffs' attorney asked him whether he had been present at the hearing to disbar Leich and defendant's lawyer objected. Plaintiffs' counsel explained the question was relevant to the credibility of Leich and defendant, and the court allowed it. Plaintiffs' attorney went on to ask several questions about defendant's testimony at the disbarment hearing, one of which was a question about the report of the panel that included a finding defendant's testimony had been "evasive and contradictory and unsupported." Defendant explained that was because "they didn't understand. Nobody understood the transaction." There was no objection to this question.

These rulings were well within the court's discretion. (*Twenty-Nine Palms Enterprises Corp. v. Bardos* (2012) 210 Cal.App.4th 1435, 1447 [abuse of discretion standard for reviewing evidentiary rulings].) The question on the cross-examination of plaintiff did not go to credibility, despite defendant's conclusory statement to the contrary, but to a pattern of litigation within plaintiffs' family. This is wholly irrelevant. Whereas the questions to defendant on their face went to his credibility. Admission of evidence is within a judge's discretion. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967) and its "mere admission" does not prove judicial bias (*In re Bettye K.* (1991) 234 Cal.App.3d 143, 152). Even a judge's erroneous rulings against a party do not constitute judicial bias. (*People v. Guerra, supra*, 37 Cal.4th at p. 1112.)

“[W]hen the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies him [or her] in the trial of the action. It is his [or her] duty to consider and pass upon the evidence produced before him [or her], and when the evidence is in conflict, to resolve that conflict in favor of the party whose evidence outweighs that of the opposing party. The opinion thus formed, being the result of a judicial hearing, does

not amount to [improper] bias and prejudice’ [Citation.]” (*Moulton Niguel Water Dist. v. Colombo, supra*, 111 Cal.App.4th at pp. 1219-1220.)

DISPOSITION

The judgment is affirmed. Plaintiffs are entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.