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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARSHALL S. GRIFFITH,

Plaintiff and Appellant,

v.

COLDWELL BANKER RESIDENTIAL
BROKERAGE COMPANY,

Defendant and Respondent.

G047506

(Super. Ct. No. 30-2008-00093810)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kim Garlin Dunning, Judge. Request for judicial notice. Judgment affirmed. Request denied.

Hubbard & Biederman, Robert W. Biederman; Steyer Lowenthal Boodrookas Alvarez & Smith, Jeffrey H. Lowenthal and Lucas E. Gilmore for Plaintiff and Appellant.

Sussman Shank, John A. Schwimmer, Patrick Rowe; Klinedinst and Neil R. Gunny for Defendant and Respondent.

Plaintiff and appellant Marshall S. Griffith, a real estate agent, worked as an independent contractor in a brokerage office owned by defendant and respondent Coldwell Banker Residential Brokerage Company. Plaintiff filed a purported class action on behalf of all real estate agents in such a relationship with defendant for unfair competition (Unfair Competition Law (UCL); Bus. & Prof. Code, §17200 et seq.) based on fraud and unlawful conduct, and for fraudulent inducement and mistake. The claim underlying all of these causes of action is that as part of plaintiff's independent contractor agreement defendant required him to pay a fee for a legal assistance program (LAP) that included defense and indemnity provisions. Plaintiff claims defendant represented the LAP was errors and omissions insurance and in fact it was, which defendant was not licensed to sell.

Plaintiff appeals from a summary judgment in defendant's favor, contending the court erred when it found the LAP was not insurance and that he could not recover on his fraud counts. We hold the court correctly granted summary judgment and affirm.

Defendant filed a request that we take judicial notice of a similar case plaintiff's counsel filed in San Francisco, now on appeal from a summary judgment in favor of a wholly owned subsidiary of defendant. It claims that action is relevant to the one before us and judicial notice is required to prevent inconsistent results. But that case is not binding on us and is not pertinent to our analysis or ultimate decision in the case before us. Moreover, it is not in the trial court record. We deny the request.

FACTS AND PROCEDURAL HISTORY

In July 2006 plaintiff signed an Independent Contractor Agreement (agreement) defining plaintiff as a real estate brokerage company and defendant as a real estate salesperson. The agreement set out the parties' various rights and responsibilities,

including plaintiff's duty to "use his . . . best efforts to list and sell residential real estate for the mutual benefit of [defendant, plaintiff] and the general public . . ." Defendant was to "make available to [plaintiff] all current listings of the office with which [plaintiff] [was] associated" and "also make available to [plaintiff] . . . names of prospective purchasers . . ." Concurrently, the parties also executed commission schedule addenda and Appendix I, a "Claims Management – Legal Assistance Program"¹ for which he was required to pay a fee.

Plaintiff left the company in March 2008 after about 20 months. During his tenure he had fewer than 10 clients, closed no sales, and earned less than \$1,000. No legal claim was ever asserted against him.

The operative complaint is the third amended complaint for fraudulent and unlawful business practices under the UCL, fraudulent inducement, and mistake. As to the fraudulent business practices (first cause of action), plaintiff alleges defendant misrepresented the LAP was errors and omissions insurance and the misrepresentation would cause a reasonable person to believe it "possessed all the attributes of licensed, admitted insurance." Plaintiff allegedly relied on defendant's misrepresentation and paid the required fee. The complaint also pleads plaintiff lost money or property because he would not have entered into the LAP or paid the fee had he known the true facts. He could have purchased errors and omissions insurance from a third party. The common law fraudulent inducement claim (third cause of action) is based on the same allegations.

The claim for unfair business practices in violation of the UCL (second cause of action) alleges defendant sold insurance without being licensed, in violation of the Insurance Code. Similarly, the mistake claim (fourth cause of action) pleads that

¹ Plaintiff executed a new LAP in 2007. It was not identical but was essentially the same.

because plaintiff mistakenly believed the LAP complied with Insurance Code regulations, he entered into the LAP and paid the fee.

Defendant filed a motion for summary judgment/motion for summary adjudication, which the court granted as to each cause of action. As to the second and fourth causes of action for unlawful conduct under the UCL and mistake, the court found the LAP was not insurance based on four separate, independent grounds discussed below. It also ruled plaintiff lacked standing under the UCL.

As to the first and third causes of action for fraudulent conduct under the UCL and common law fraud, the court determined as a matter of law that plaintiff had no private right of action under the UCL, nor did he have standing. Further, as to the fraud cause of action, the court found no triable issue of material fact that defendant made a material misrepresentation or that plaintiff relied on it. As an independent ground it also found no triable material issue that plaintiff suffered damages as a proximate result of any alleged misrepresentation.

Additional facts are set out in the discussion.

DISCUSSION

1. Introduction

A defendant moving for summary judgment bears the burden of demonstrating one of the elements of the cause of action “cannot be established, or that there is a complete defense” (Code Civ. Proc. , § 437c, subd. (p)(2); see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Once this burden is met, the onus shifts to the plaintiff to provide sufficient evidence to demonstrate a triable issue of material fact exists. (*Ibid.*) “[I]f all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law” summary judgment “shall be granted.” (Code Civ. Proc., § 437c, subd. (c).)

2. Second and Fourth Causes of Action for Unlawful Business Practice in Violation of the UCL and Mistake

The second and fourth causes of action are premised on the allegation the defense and indemnity provisions contained in the LAP are insurance. The trial court found they are not. We agree.

Insurance is defined as “a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event.” (Ins. Code, § 22.) “Case law has construed the statute as requiring two elements: ‘(1) a risk of loss to which one party is subject and a shifting of that risk to another party; and (2) distribution of risk among similarly situated persons.’ [Citation.]” (*Truta v. Avis Rent A Car System, Inc.* (1987) 193 Cal.App.3d 802, 812 (*Truta*), overruled by statute on another ground as set out in *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1155, fn. 5.) But an agreement is not an insurance contract merely because these two elements are present. (*Ibid.*) ““A statute designed to regulate the business of insurance . . . is not intended to apply to all organizations having some element of risk assumption or distribution in their operations. The question of whether an arrangement is one of insurance may turn, not on whether a risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its *principal object and purpose.*’ [Citation.]” (*Truta, supra*, 193 Cal.App.3d at p. 812, italics added.)

a. Second Cause of Action for Unlawful Business Practice

The second cause of action alleges defendant engaged in the unlawful business practice of selling insurance under the LAP without being properly licensed. The court ruled, among other things, there was no triable issue of material fact as to the

“principal object and purpose” of the parties’ relationship. It found the undisputed material facts showed the relationship was one of real estate broker and agent, not “furnishing of indemnity” and the LAP was merely incidental to that relationship.

Plaintiff claims the court erred in relying on *Transportation Guar. Co. v. Jellins* (1946) 29 Cal.2d 242 in support of this ruling, arguing the indemnity agreements in that case were dissimilar. This may be true but is beside the point. *Jellins* is important for its black letter law, not the terms of the indemnity agreements. “[I]t was not the purpose of the insurance statutes to regulate all arrangements for assumption or distribution of risk. That view would cause them to engulf practically all contracts The fallacy is in looking only at the risk element The question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object and purpose.” (*Id.* at p. 249.)

Plaintiff further maintains the court “misapplied the standard” of the principal object and purpose test in finding the LAP was secondary to the agreement. He points to language in a ruling by a different trial judge on the demurrer to the first amended complaint, which concluded the contrary. But as stated in that ruling, it dealt only with the demurrer and was not dispositive of any further motions: “The determination of ultimate legal and factual issues presented by this lawsuit is not the proper focus of a demurrer. That decision is for another day.”

In addition, plaintiff argues the trial court ignored *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62 in finding the LAP was ancillary to the agreement. In *Sweatman*, veterans who wanted a home loan were required to buy a home protection plan providing coverage to pay off the loan balance in the event of disability. The appellate court relied on *Truta* to find the policy was secondary to the loan and thus did not constitute insurance. Although the Supreme Court affirmed the ruling it rejected the rationale, distinguishing the facts in *Truta*. (*Id.* at pp. 73-74.) It noted coverage in *Truta* was optional whereas the plan in *Sweatman* was mandatory. (*Id.* at p. 73.) Further,

the *Sweatman* plan was separate from the loan agreement, with a separate application, “including medical disclosures, subject to investigation and review.” (*Id.* at pp. 73-74.) Approval for the plan was also distinct from loan approval. (*Id.* at p. 73.) Finally, the plan was “a spreading of risk within insurance concepts” not a “tangential risk allocation” as in *Truta*. (*Id.* at p. 74.)

Plaintiff asserts the LAP is comparable to the *Sweatman* plan because it is mandatory, is distinct from the agreement because it has certain conflicting terms, such as jurisdiction and venue, that supersede the agreement, survive termination of the agreement, and do more than allocate a tangential risk.

Preliminarily, we note the discussion about *Truta* in *Sweatman* was dicta, since the *Sweatman* court found the plan was not insurance based on the fact the Insurance Code did not regulate the Cal-Vet coverage at issue. (*Sweatman v. Department of Veterans Affairs, supra*, 25 Cal.4th at p. 74.) Thus, *Sweatman* did not involve an analysis under the “principal object and purpose” test.

Further, the plan in *Sweatman* was not at all comparable to the LAP. It was a completely separate contract relying on different factors for approval and requiring a substantial application, and coverage could potentially be declined. Here defendant required no application nor separate approval for the LAP. Despite plaintiff’s claims the LAP was a “self-contained” contract that survived termination of the agreement, the agreement and the LAP itself belie that assertion. The agreement requires both parties to comply with the LAP, which is attached and made a part of the agreement. Although the 2007 version of the LAP states its terms supersede any inconsistent terms in the agreement, it also states the LAP “is a part” of the agreement. Thus, by its own terms the LAP was not separate from the agreement. It had no meaning outside the context of the agreement but was part of the agreement as a whole.

And as defendant points out, there were several mandatory provisions in both the agreement and the LAP, including, in the LAP, plaintiff’s contribution toward

costs of defense cooperation in connection with any claims, and indemnification of defendant in certain instances.

Claver v. Coldwell Banker Residential Brokerage Company (S.D.Cal., Dec. 21, 2009, Civ. No. 08cv817-L(AJB)) 2009 WL 5195969 is helpful to our analysis. There the plaintiff filed a similar suit against defendant, alleging causes of action including violation of the UCL. It was based on the same claim the LAP was insurance, which the defendant had sold without being licensed. The court granted a motion to dismiss the UCL claim count, finding the LAP was not insurance. (*Id.* at p. *4.) It ruled that even if risk shifting and distribution of loss were present, it was not insurance when analyzed under the principal object and purpose test. (*Id.* at p. *3.) It found the principal object was listing and sale of real estate. (*Id.* at p. *4.) It rejected the plaintiff's reliance on a claim the LAP was mandatory, stating, "Whether the risk allocation provision is mandatory or optional is not determinative of the contract's principal object and purpose. [Citation.]" (*Ibid.*) We find this reasoning persuasive.

In challenging the finding the LAP was incidental to the purpose of the agreement, plaintiff additionally argues the court erred in failing to apply factors set out in *Automotive Funding Group, Inc. v. Garamendi* (2003) 114 Cal.App.4th 846, including whether the LAP program is mandatory or generates a profit for the indemnitor (*id.* at pp. 855-856). But *Automotive Funding* did not hold these factors are required in an analysis of the principal object and purpose test. Rather, the appellant there raised these elements as arguments and the court needed to address them. A party's contentions do not somehow become law merely because raised. And no published case has relied on these factors.

Plaintiff also devotes several pages to discussing the two elements of the definition of insurance set out in case law, i.e., shift of risk of loss and distribution of that risk. (*Truta, supra*, 193 Cal.App.4th at p. 812.) He asserts the court erred by failing to address whether the risk shifting and distribution aspects of the LAP were what insurance

regulations are enacted to regulate. But these arguments are made outside the context of and without discussing the principal object and purpose test, which is controlling.

Plaintiff challenges the three independent grounds on which the court relied: 1) under Business and Professions Code section 10032, subdivision (a), defendant, as the broker, would be jointly and severally liable for any of plaintiff's misconduct; 2) the LAP was "a contractual allocation in advance of risks and responsibilities between [the parties], which provides certainty as to their respective rights and obligations" in advance of any legal claim being filed; and 3) plaintiff lacked standing under the UCL because he was not injured and lost no money or property due to the alleged unfair competition, i.e., defendant's failure to register with the California Insurance Commissioner. Because we affirm on the principal object and purpose test, we have no need to discuss these alternative rulings.

There is no triable material issue fact. The LAP was not an insurance policy and plaintiff cannot prevail on the second cause of action alleging defendant engaged in unfair competition by unlawfully selling insurance without being licensed.

b. Fourth Cause of Action for Mistake

The fourth cause of action, pleaded "in the alternative," was based on plaintiff's alleged mistake in believing the LAP complied with Insurance Code regulations, causing him to enter into the LAP and pay the fee to defendant. Plaintiff acknowledges this cause of action rises or falls with the second cause of action. Thus, we affirm the summary judgment as to this cause of action as well.

3. First and Third Causes of Action for Fraud-Based Claims

Plaintiff alleges when he signed the LAP, he relied on defendant's representation it was errors and omissions insurance and as a result "believed [it] possessed all the attributes of licen[s]ed insurance coverage," including that defendant

“was licensed to . . . sell insurance,” “was subject to financial solvency regulation,” “maintained reserves” required under the Insurance Code, and “participated in a state insurance guaranty fund.” If he had known such was not true, he would never have entered into the LAP or paid the fee.

In the first cause of action plaintiff pleads defendant engaged in the fraudulent business practice of representing the LAP was errors and omissions insurance but concealing it was not a registered insurance company and did not meet the requirements necessary to qualify as such a company. This conduct induced plaintiff to enter into the agreement and the LAP. The third cause of action for common law fraudulent inducement is based on these same allegations.

The court found, as a matter of law, there was no private right of action under the UCL for the fraudulent business practices claim, citing Insurance Code section 790.03, subdivision (b), *Moradi-Shalal v. Fireman’s Fund Ins. Companies* (1988) 46 Cal.3d 287 (*Moradi-Shalal*), and *Maler v. Superior Court* (1990) 220 Cal.App.3d 1592. We find this rationale persuasive.

Under Insurance Code section 790.03, subdivision (b), “[m]aking or disseminating . . . any statement containing any assertion, representation, or statement with respect to the business of insurance . . . which is untrue, deceptive, or misleading . . .” is defined as unfair competition in “the business of insurance.” *Moradi-Shalal v. Fireman’s Fund, supra*, 46 Cal.3d 287 held that there was no private right of action under the Unfair Insurance Practices Act (Ins. Code, § 790 et seq.; UIPA) of which section 790.03 is a part. (*Moradi-Shalal, supra*, at p. 305.) *Maler v. Superior Court, supra*, 220 Cal.App.3d 1592 held a plaintiff could not “circumvent [*Moradi-Shalal*’s] ban [on private rights of action] by bootstrapping an alleged violation of [Insurance Code section 790.03] onto Business and Professions Code section 17200 so as to state a cause of action . . .” (*Id.* at p. 1598.)

Plaintiff maintains *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257 overruled the holdings in these cases and allowed a claim under the UCL and the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.). Although it is correct *Manufacturers Life* held a claim under the Cartwright Act was not exempted by the UIPA, the case did not extend to claims under the UCL. (*Manufacturers Life Ins. Co. v. Superior Court, supra*, 10 Cal.4th at p. 263.)

As an independent ground for granting summary judgment on the UCL cause of action the trial court found there were no triable issues of fact that any of defendant's alleged misrepresentations were material or that plaintiff relied on them. It cited to the following testimony by plaintiff at his deposition: At the time he investigated defendant before entering into the agreement, plaintiff did not believe defendant was an insurance company; he had never heard of the California Insurance Guarantee Association; he never believed defendant was licensed by the California Insurance Commissioner to sell insurance; and plaintiff had no understanding of the requirements for licensed insurance companies such as financial solvency or reserves or ever spoke to defendant about them. Further, plaintiff did not know what made a licensed insurance company any different from one that was unlicensed. Additional facts are plaintiff's testimony he was never concerned defendant might not be able to meet its financial obligation under LAP. The first time he was believed the LAP violated regulations because it was not registered was when he spoke with his lawyer after he left the company.

In contradiction, plaintiff cites to other portions of his testimony he claims show the representations were material. When he first discussed the possibility of contracting with defendant, he spoke to one of defendant's representative, Patti Anches. She told him to become a sales agent he "had to pay for [his] E&O insurance." He did not remember if she said who would provide the coverage or any other details of his conversation on this topic. He identified a credit card authorization he signed, which he

understood to be payment for E&O insurance, but had no memory of signing it. He further stated the only other time the term E&O was used by defendant was at one or two associate meetings when someone said the cost was going up. He also testified he understood what it meant for an insurance company to be licensed, that it was regulated by the state, but had no idea of the requirements.

The testimony cited by plaintiff creates no triable issue as to the materiality of the alleged misrepresentation. Nothing he stated supports the allegations in the complaint.

Plaintiff additionally points to his declaration in opposition to the motion for summary judgment, where he stated he relied on Anches's representation the LAP was errors and omissions insurance and he would not have contracted with defendant otherwise because he was a new agent and wanted to be protected. It was "critical" that the insurance be issued by a licensed company.

But these statements contradict his deposition testimony he never believed defendant was licensed and did not even know the difference between being licensed or not licensed or the requirements for licensed companies. His deposition testimony controls and he cannot create a triable issue with a contradictory declaration. (*Archdale v. American Internat. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 473 ["self-serving declarations contradict[ing] credible [deposition testimony that] purport to impeach that party's own prior sworn testimony . . . should be disregarded".])

Thus, the trial court was correct in finding there is no triable issue of fact the alleged misrepresentations were not material to plaintiff. This conclusion supports affirmance of the judgment as to both fraud-based causes of action.

Another independent ground for the grant of summary judgment was plaintiff's lack of standing under the UCL because he provided no facts showing he was damaged by loss of property or money as a result of the alleged misrepresentations. This

also shows no proximate cause as to the common law fraud cause of action. Again, we need not discuss this issue since the other grounds are dispositive.

DISPOSITION

The judgment is affirmed. The request for judicial notice is denied. Defendant is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.