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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NIV BENSHALOM,

Plaintiff and Appellant,

v.

FIRST HORIZON HOME LOANS,

Defendant and Respondent.

G050919, G050920

(Super. Ct. No. INC087918)

O P I N I O N

Appeals from a judgment of the Superior Court of Riverside County, John G. Evans, Judge. Affirmed.

Law Offices of Thomas J. McDermott and Thomas J. McDermott, Jr., for Plaintiff and Appellant.

Duane Morris, Brett L. Messinger and Heather U. Guerena for Defendant and Respondent.

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Plaintiff Niv Benshalom filed a first amended complaint containing 10 causes of action against a number of individuals and entities, including First Horizon Home Loans' predecessor in interest.¹ First Horizon was named in seven of the 10 causes of action. The superior court granted First Horizon's motion for summary judgment and found First Horizon was entitled to attorney fees. The court subsequently awarded First Horizon \$70,834.06 in attorney fees. In case No. G050919, Benshalom appealed from the judgment in favor of First Horizon following the granting of First Horizon's motion for summary judgment. In case No. G050920, he appealed from the order awarding First Horizon attorney fees. The cases were ordered consolidated on appeal.

Benshalom's opening brief did not address the issue of attorney fees, except to point out that if we reverse the summary judgment, the attorney fees award would also have to be reversed. We find, however, the court did not err in granting First Horizon summary judgment. Because Benshalom has not argued the award of attorney fees was erroneous on any other ground, we affirm the attorney fees award as well.

I

FACTS AND PROCEDURAL HISTORY

Benshalom entered into a purchase agreement and escrow instructions for an unimproved home site (the property) in Rancho Mirage. The home site was one of four on a cul-de-sac. The seller was Toscana Development LLC (Toscana). Charles L. Knief, a principal of Toscana, signed the agreement on behalf of Toscana. Under the agreement, Benshalom was required to build his residence in conformity with the design guidelines for residences in the "Seclude Design Guidelines." The purchase price of the property was \$600,000. The sales agreement, however, was "contingent and incumbent upon" Benshalom entering into a home construction agreement. Pursuant to the sales

¹ For simplicity and ease of reading, we refer to First Horizon Home Loans and its predecessor in interest as First Horizon.

agreement, Benshalom entered into a home construction agreement with Milestone Assurance, Inc. (Milestone), which also was run by Knief. The construction cost of the new residence was \$1,150,000. Milestone then entered into a contractor's agreement naming ARC Services as the contractor.

Benshalom took out a \$1,150,000 residential construction loan (construction loan agreement) with First Horizon. First Horizon determined that ARC Services had an active California contractor's license. Later, Benshalom took out a second loan with First Horizon, a balloon note for \$150,000. Both loans were secured by deeds of trust. Under the terms of the construction loan agreement, signed on May 2, 2006, and extending through to July 8, 2007, funds were to be disbursed as construction on the residence progressed. During the construction period scheduled to end on July 8, 2007, Benshalom was to pay interest only on the disbursed amounts. At the conclusion of the construction period Benshalom was to convert the loan into a permanent loan whereby he would be required to pay principal and interest on the new loan.

In order to authorize a disbursement under the construction loan agreement, Benshalom had to provide First Horizon with the plans and specifications of the improvements together with the approval of appropriate governmental agencies. Additionally, any "draw request" was to be executed by Benshalom and the contractor. The contract provided that Benshalom could not "endorse or deliver" any checks from First Horizon to the contractor until the work for which the contractor was being paid had been completed and the contractor made certain representations to First Horizon regarding completion of that phase of the work and that the check covered all labor and material contributed to the work to date.

The construction loan agreement specifically stated First Horizon had no obligation to Benshalom or anyone else to verify advances were actually used to pay for labor or materials used in the construction. In the same paragraph of the agreement, Benshalom stated his understanding that he had selected the contractor and he assumed

all risks in the event his contractor failed to pay for all labor and materials or otherwise failed to perform under the contract. The draw request forms contained the following paragraph: “General Contractor/Builder and Borrower state that all of the funds requested in this ‘Draw Request’ will be used to pay for the labor and materials which created the improvements to the subject property. General Contractor/Builder and Borrower further state that all funds advanced before the date of this request (if any) were also used to pay for labor and materials for the improvement of the subject property. Borrower and General Contractor/Builder also state that the improvements completed to the subject property were completed as per the ‘Plans and Specifications’ originally submitted to the Lender, except for the ‘Change Orders’ listed below[.]”

Benshalom testified at his deposition that he understood he bore the risk of the contractor not performing, given he hired the contractor. Benshalom and Knief, as principal for Milestone, made a number of draw requests. Each request contained an affidavit stating bills had been paid, that Benshalom and Knief each inspected the property, and all work had been completed to their satisfaction.

Disputes arose in the construction of the residence. Benshalom was unhappy with the quality of materials used and with what he considered defects in the workmanship. He and Knief did not resolve the dispute, leading to the construction company walking off the job. Because the construction was not completed and Benshalom did not convert the loan into permanent financing, First Horizon non-judicially foreclosed on the loan and sold it to a third party.

In September 2010, Benshalom filed a first amended complaint alleging 10 causes of action. Toscana, Milestone, Knief, and others, including First Horizon were named as defendants. First Horizon was named as a defendant in seven of the causes of action: two causes of action for breach of contract, two causes of action for negligence, fraud and deceit, negligent misrepresentation, and violation of various Business and Profession Code sections. The complaint alleged construction of the residence was not

completed because the builder abandoned the project when it was 50 to 60 percent complete, First Horizon non-judicially foreclosed on the property, and transferred title “to an unknown party.”

First Horizon answered the first amended complaint and then filed a motion for summary judgment. After considering statements of undisputed facts, the superior court granted First Horizon summary judgment. The court found Benshalom admitted his contractual relationship with First Horizon, that First Horizon met its initial burden, and Benshalom failed to demonstrate a triable issue of fact in any of the causes of action against First Horizon. The court denied Benshalom’s subsequent motion for reconsideration and entered judgment in favor of First Horizon. The court further found First Horizon was entitled to attorney fees and costs. Dismissals were entered in favor of the remaining defendants at Benshalom’s request and First Horizon dismissed its cross-complaint. Benshalom appealed (G050919). He contends the court erred in granting First Horizon summary judgment.

First Horizon filed a memorandum of costs and a motion for attorney fees. The court awarded First Horizon \$70,834.06 in attorney fees. Benshalom again appealed (G050920).

II

DISCUSSION

A. Appeal in Case No. G050919

Benshalom concedes the facts in this matter are not in issue. As we have stated before, “The purpose of summary judgment is to provide courts a procedural tool to eliminate those ‘cases in which there is no ascertainable issue of fact to be tried. [Citations.]’ [Citation.] ‘[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.’ [Citation.] A cause of action is meritless if ‘[o]ne or more of the elements of the cause of action cannot be separately established . . .’ (Code Civ.

Proc., § 437c, subd. (o)(1)), or the defendant has established an affirmative defense to the plaintiff's causes of action (Code Civ. Proc., § 437c, subd. (o)(2)).

“A defendant moving for summary judgment has the burden of presenting facts to negate an essential element of each cause of action or to show there is a complete defense to each cause of action. [Citation.]’ [Citation.] If the defendant meets this showing, the burden then shifts to the plaintiff to present specific facts establishing a triable issue exists as to one or more material facts. [Citations.] ‘There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’ [Citation.] If the plaintiff then fails to meet her burden, the defendant is entitled to summary judgment. (Code Civ. Proc., § 437c, subd. (c).)

“We review de novo a trial court’s ruling on a summary judgment motion. [Citation.] Where the trial court has granted summary judgment, we consider ‘all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.]’ [Citation.] In other words, we apply the same rules and standards governing a trial court’s decision in ruling on the motion. In so doing, should we find the trial court’s ultimate decision was correct, we affirm even if we find the trial court’s rationale was incorrect. In other words, ‘[t]he sole question properly before us on review of the summary judgment is whether the judge reached the right *result* . . . whatever path he might have taken to get there, and we decide that question independently of the trial court. [Citation.]’ [Citation.]” (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1445-1446.)

1. *Breach of Contract (Fourth and Eighth Causes of Action)*

A breach of contract action has four elements: (1) a contract, (2) plaintiff’s compliance with the terms or the contract or a valid excuse for nonperformance, (3) the defendant’s breach of the contract, and (4) plaintiff sustained damages as a result of the

defendant's breach. (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.) "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638.) "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title." (Civ. Code, § 1639.) The construction loan contract with First Horizon specifically provided "Lender shall have no obligations, either express or implied, to Borrower, or to any third parties, to verify that advances made hereunder are actually to pay for labor or materials used in connection with the construction" In the same paragraph, Benshalom agreed he assumed "all risks in the event Contractor . . . fails to perform under the Contract" because he selected the contractor.

The trial court found Benshalom's relationship with First Horizon was contractual and Benshalom admitted evidence of the contract. Benshalom alleged in the fourth and eighth causes of action that First Horizon breached its contract with him. In the fourth cause of action, he alleged First Horizon was required to approve the contractor for the construction of a residence on his property, during its investigation First Horizon discovered that Milestone and Knief did not have a valid California contractor's license, and failed to inform him of that fact. He further alleged First Horizon failed to perform its duty to "audit the construction" of the residence to his detriment.

In the eighth cause of action, Benshalom alleged First Horizon breached the loan agreement by advancing monies in the draws without verifying the previous phases had been completed or "properly completed," and that as a result, the residence was left "partially constructed and so poorly constructed that extensive remedial work was required."

Horizon established a complete defense to the breach of contract actions. First, the contractor, ARC Services, was licensed. Next, First Horizon did not have a

duty to “audit” the construction. While First Horizon had the *right* to inspect the construction, the construction loan agreement provided First Horizon did “not [have] the obligation” to do so. According to the terms of the construction loan agreement, Benshalom selected the contractor and agreed “to assume all risks in the event Contractor . . . fails to perform under the Contract.” The construction loan agreement further provided that each request for a draw would be deemed a representation *by Benshalom and the contractor*—not First Horizon—that no default existed to date and the work performed to that point was satisfactory. In fact, in each draw requested by Benshalom, *he* warranted “that no default exist[ed], that all obligations under the Security Instrument and [the construction loan agreement had] been fully complied with, that all Work performed to the date of the advance [had] been performed in a good and workmanlike manner in conformance with the Plans and Specifications”

The agreement provided that draws on the loan amount would be made *at Benshalom’s request* and he “acknowledges and agrees that such advances are made at [his] request and that [First Horizon] shall have no liability, obligation or responsibility whatsoever with respect to the use of said advances.” Although the loan agreement provided First Horizon would issue two-party checks in response to a draw request, it contained an exception whereby payment would be made directly to the contractor if requested by Benshalom. Benshalom admitted he requested First Horizon to wire all payments directly to Milestone.

Having established a complete defense, Horizon’s burden shifted to Benshalom to raise a triable issue of a material fact. (Code Civ. Proc., § 437c, subd. (c).) He failed to do so. Specifically, he failed to introduce evidence that he complied with the terms of the contract or had a valid excuse for not doing so, that First Horizon breached the contract, and that he suffered damages as a result of a breach of the contract. Accordingly, the court did not err in granting First Horizon’s motion for summary judgment or summary adjudication on the breach of contract causes of action.

2. Negligence (*Fifth, Seventh, and Ninth Causes of Action*)

In the fifth cause of action, the complaint alleged First Horizon knew or should have known the residence was not adequately designed, engineered or constructed, First Horizon owed him a duty of care and breached it by failing to assure the residence was properly constructed. In the seventh cause of action, Benshalom alleges First Horizon made representations to him and failed to provide him with information it had a duty to provide. In the ninth cause of action, it was alleged First Horizon assumed the responsibility of inspecting the construction and to inform him of defects.

““[T]he distinction between tort and contract is well grounded in common law, and divergent objectives underlie the remedies created in the two areas. Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate ‘social policy.’ [Citation.]” [Citations.]” (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550-551.) An action for negligence consists of the defendant owing the plaintiff a legal duty to use due care, a breach of that duty, and a resulting injury proximately caused by the breach. (*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 573.)

As with the breach of contract causes of action, First Horizon established a complete defense. It established the relationship between itself and Benshalom was contractual, as the superior court found and as evidenced by the construction loan agreement. The contract between First Horizon and Benshalom did not create a duty to Benshalom by First Horizon to inspect the construction and inform him of any defects. (See *Chazen v. Centennial Bank* (1998) 61 Cal.App.4th 532, 537 [bank is not fiduciary of its depositor; the relationship is based on contract].) First Horizon’s obligation to Benshalom was to comply with the terms of the construction loan agreement, just as compliance with the terms of the construction loan agreement was Benshalom’s obligation to First Horizon. As we noted above, each time Benshalom made a draw

request, *he* warranted “that no default exist[ed], that all obligations under the Security Instrument and [the construction loan agreement had] been fully complied with, that all Work performed to the date of the advance [had] been performed in a good and workmanlike manner in conformance with the Plans and Specifications” Moreover, while the contract provided First Horizon the “right” to inspect the property and construction, “[a]ny inspection conducted by [First Horizon was for First Horizon’s] sole protection and benefit.” As a commercial lender, First Horizon was entitled to pursue its own interests. (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1093, fn. 1.) Benschalom did not introduce any evidence that the construction loan agreement was anything other than an arm’s-length transaction. Therefore, there was no fiduciary duty between First Horizon as a lender and Benschalom as a borrower. (*Bank of America Corp. v. Superior Court* (2011) 198 Cal.App.4th 862, 871.) It was not First Horizon’s obligation to inspect the construction and to report its findings to Benschalom. A breach of contract does not become a tort, absent the existence of an independent duty “arising from principles of tort law” (*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 95), and Benschalom failed to introduce any evidence that First Horizon owed him any duty other than complying with the terms of the construction loan agreement.

a. *Exculpatory Clauses*

Benschalom argues the construction loan contract contained unenforceable exculpatory clauses. According to Benschalom, the construction loan agreement purported to “excuse[] a crime and immunized First Horizon from paying damages caused by its own recklessness.” The construction loan agreement did no such thing.

“The law has traditionally viewed with disfavor attempts to secure insulation from one’s own negligence or willful misconduct, and such provisions are strictly construed against the person relying on them, particularly where such person is their author. [Citations.]” (*Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d

642, 654.) A contract that has as its object ““directly or indirectly, to exempt anyone from the responsibility for his own fraud or willful injury to the person or property of another, or violation of law, whether willful or negligent, [is] against the policy of the law.’ [Citation.]” (*Ibid.*) The flaw in Benshalom’s argument is that the contract did not purport to insulate First Horizon from its own negligence or willful misconduct. As we stated above, a contract relationship between a bank and its lender does not create a duty to the lender on the bank’s part, other than to abide by the contract. Because First Horizon did not owe a duty to Benshalom (other than a duty to comply with the terms of the construction loan agreement), the construction loan agreement did not purport to excuse First Horizon from a violation of a duty owed to him. The contract did not establish a fiduciary duty on First Horizon’s part. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [a bank does not owe a fiduciary duty to its loan customers].) Defendant received from First Horizon exactly what he bargained for: payment on draws *he requested*.

Benshalom’s reliance on *Hiroshima v. Bank of Italy* (1926) 78 Cal.App. 362, is misplaced. There, the plaintiff obtained a judgment against the bank for negligently paying the amount of a check upon which he had ordered a stop payment directive. (*Id.* at p. 365.) The appellate court found the bank could not avoid responsibility for failing to follow its customer’s request to stop payment on a check. (*Id.* at p. 374.) Liability was based on the bank not following the depositor’s direction. Consequently, the case is not authority for the proposition that a bank is liable to a borrower *for following the borrower’s directions*, as First Horizon did in this case.

The construction loan agreement did not contain exculpatory clauses. Accordingly, the superior court did not err in rejecting Benshalom’s argument.

3. *Fraud and Deceit (Sixth Cause of Action)*

In the sixth cause of action, defendant alleged First Horizon had a duty to him to inform him of the status of Knief’s state contractor’s license and of the “true

condition” of the residence being constructed. He further alleged, among other things, that First Horizon intentionally misrepresented to him that Milestone had a contractor’s license, and intentionally concealed from him that the residence being constructed “was unfit for human habitation. “The elements of fraud, which give rise to the tort action for deceit, are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another’s reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage. [Citation.]” (*Conroy v. Regents University of California* (2009) 45 Cal.4th 1244, 1255.)

The construction loan agreement did not name Knief or Milestone as the contractor. Additionally, Benshalom admitted the construction loan agreement stated *he* selected the contractor and assumed any risk of the contractor failing to perform pursuant to the construction contract. Apparently, Knief was working under ARC’s contractor’s license.

The fact that Benshalom agreed First Horizon had no duty to inspect the construction site, as stated in the construction loan agreement, was not disputed by Benshalom and he offered no contrary evidence. Again, the construction loan agreement provided that inspection of the property by First Horizon does not imply the improvements were free from defect or deficiency. What is more, the agreement provided Benshalom was not to rely on any inspection performed by First Horizon, but could conduct his own inspections. (See Code Civ. Proc., § 473c, subd. (b)(3) [failure of plaintiff to state the evidence supporting a purported disputed fact is sufficient reason for court to grant summary judgment].) In connection with the selection of the contractor, the contract provided Benshalom performed his own due diligence concerning the contractor’s qualifications, etc., and would hold First Horizon harmless from any loss resulting from the contractor’s performance.

Benshalom introduced no evidence of a duty on First Horizon’s part to inform him that Knief did not have a current contractor’s license. Additionally, there is

no evidence First Horizon selected ARC as the contractor. And, as we have already stated, First Horizon had no duty to report to Benshalom on the progress of the construction. The superior court did not err in finding in favor of First Horizon on the sixth cause of action.

4. *Business and Professions Code Violation (Tenth Cause of Action)*

In the tenth cause of action, Benshalom alleged against all defendants violations of a number of Business and Professions Code sections including those pertaining to advertising by a nonlicensed contractor (Bus. & Prof. Code, § 7027.1), contracting without a license (Bus. & Prof. Code, § 7028), and a licensed contractor failing to include the license number on documents (Bus. & Prof. Code, § 7030.5). In connection with First Horizon's purported liability in this cause of action, Benshalom reiterated his complaint that First Horizon did not advise him that Knief and Milestone did not have contractor's licenses, an obligation we have concluded did not exist.

Once again, First Horizon established a complete defense. First Horizon is not a contractor and did not hold itself out as a contractor. It was a lender, period. Benshalom failed to introduce any evidence to carry his burden once the burden shifted to him from First Horizon.

We also note a significant portion of Benshalom's opening brief urged that Milestone and Knief were the contractors in this case, that unlicensed contractors must disgorge payments received on a project performed while unlicensed, and that First Horizon aided and abetted the violations of the Business and Professions Code. The argument that First Horizon was an aider and abettor was not raised below and is now raised for the first time on appeal. This Benshalom cannot do. (*Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1383.) “[A] party is not permitted to change his position and adopt a new and different theory on appeal” [citation]. “To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing party.” [Citation.]’ [Citation.]” (*Ibid.*)

Additionally, to the extent Benschalom may be understood to be seeking disgorgement from First Horizon, we reject the argument. First, there is no evidence First Horizon selected the contractor. Second, we have been cited no authority for the proposition that First Horizon can be required to disgorge the payments *it made* to Knief or Milestone *at* Benschalom's request. While the law requiring an unlicensed contractor to refund monies received for work performed without a license (Bus. & Prof. Code, § 7031, subd. (b)) may be used as "a sword" against the unlicensed contractor (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 519), there is no reason to believe that sword was intended to be used against anyone other than an unlicensed contractor, i.e., the bank that paid the unlicensed contractor at the direction of the person who had the work performed by the unlicensed contractor. Indeed, Business and Profession Code section 7031, subdivision (b) was enacted to address the result in *Cooper v. Westbrook Torrey Hills* (2000) 81 Cal.App.4th 1294, wherein the appellate court concluded subdivision (a) of Business and Professions Code section 7031 (unlicensed contractor cannot sue to collect for work performed without a license) did not require an unlicensed contractor to refund money "already paid" to the unlicensed contractor. (*White v. Cridlebaugh, supra*, 178 Cal.App.4th at p. 519.) Thus, it is clear the legislative purpose of subdivision (b) of section 7031 of the Business and Profession Code was to require the *unlicensed contractor* to return sums it received. The statute does not require any party to disgorge funds it never received, much less sums it paid the unlicensed contractor at the direction of the party who engaged the contractor. Disgorge means to refund that which was received. First Horizon paid. It did not receive. One cannot disgorge what one has not received.

B. *Appeal in Case No. G050920*

Benschalom's opening brief only challenges the court's award of attorney fees to

the extent such an award must be vacated if the trial court erred in granting First Horizon summary judgment. As we have affirmed the court's decision granting summary judgment, we also affirm the award of attorney fees.

III

DISPOSITION

The judgment is affirmed. First Horizon shall recover its costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.