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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PYONG CHIM CHANG, Plaintiff and Appellant, v. CONNIE JU et al., Defendants and Respondents.	B215285 (Los Angeles County Super. Ct. No. LC079312)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard A. Adler, Judge. Affirmed.

Pyong Chim Chang, in pro. per., and Kavita Sadana for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

INTRODUCTION

Plaintiff Pyong Chim Chang appeals from a summary judgment in favor of defendants Connie and David Ju. We affirm.

FACTS

In 1990, plaintiff purchased a condominium in Reseda for $153,000.[1] The mortgage was $120,000. By 1995, the fair market value of the condominium was $80,000 and the property was in foreclosure.

Plaintiff wanted to sell the condominium but could not find a buyer. He asked family members to buy the property. His daughter, defendant Connie Ju (defendant),[2] agreed to buy the condominium for $80,000. In November 1995, defendant purchased the property. Plaintiff signed a grant deed, which was recorded. Plaintiff made no contribution to the purchase.

After defendant purchased the condominium, plaintiff made rental payments to her in the amount of $650 per month. He did not make any mortgage payments, pay homeowners association fees or pay property taxes on the condominium.

Plaintiff did not enter into a written contract with defendant regarding the purchase of the condominium other than the purchase agreement. Plaintiff has no written agreement that defendant was to be his advisor regarding the purchase. Defendant never agreed to be plaintiff's fiduciary with respect to the purchase.

In 2003 or 2004, the manager of the homeowners association yelled at plaintiff's wife, causing plaintiff emotional distress. Plaintiff did not tell defendant about this incident.

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[1] Dollar values are approximations.

[2] The other defendant, David Ju, is Connie's husband.

Plaintiff believed he still owned the condominium. In 2006, he had a brief conversation with defendant in which she stated that she owned the condominium. This caused him emotional distress.

PROCEDURAL BACKGROUND

In October 2007, plaintiff filed a complaint against defendant and her husband alleging breach of fiduciary duty, breach of contract, fraud, harassment, and harm to family relations. He sought damages, injunctive relief and specific performance.

Plaintiff alleged that he and defendant "entered into an agreement for the property . . . that was to commence on or about May 1995 up to an indefinite time required by plaintiff, and shall continue thereafter until but not limited to transfer to retirement home or death." When property values rose, defendant and her husband asked plaintiff to leave the condominium but would not tell him why. He refused. Defendant and her husband claimed that the condominium was theirs, not plaintiff's.

Plaintiff alleged that defendant owed him a fiduciary duty as his "daughter and adviser." She breached this duty "in fraudulently denying the plaintiff of said property."

Plaintiff also alleged that he and defendant entered into an agreement whereby defendant would make the mortgage payments on the condominium and plaintiff would make payments to the homeowners association. Plaintiff made the payments required under the agreement, but defendant "fraudulently denied [him] of said property."

Plaintiff alleged that defendant harassed him by refusing to see him and threatening to call the police. She additionally harassed him by "depriving plaintiff of amenities at said property denying them dignity from friends and neighbors who visit them, after numerous requests to provide those said amenities . . . in an effort to make plaintiff submit." This harassment also disrupted his relationship with his family.

In addition to damages, plaintiff sought injunctive relief to compel defendant not to make fraudulent claims against him and to enter into an agreement "to stop engaging in making fraudulent claims against the plaintiff." He also sought specific performance

of an agreement between himself and defendant that "expressly prohibits [defendant] from engaging in fraudulent claims, relating to the plaintiff."

On the motion of defendant and her husband, the trial court granted summary judgment. It explained the undisputed evidence showed that defendant and her husband were not fiduciaries of plaintiff. There is no fiduciary relationship based on familial relations alone, and defendant did not agree to be a fiduciary of plaintiff. Therefore, there was no liability for breach of fiduciary duty.

There was no evidence of a contract between plaintiff and defendant regarding payment of the mortgage and homeowners association fees, and any such agreement would violate the statute of frauds and lack consideration. Therefore, there was no liability for breach of contract.

The court found no evidence of fraudulent assertions or harassment. Rather, the evidence showed defendant and her husband purchased the condominium from plaintiff then agreed to rent it to him. Thus, any assertions as to these facts were not fraudulent.

DISCUSSION

Standard of Review

Summary judgment properly is granted if the evidence submitted in support of and opposition to the motion establishes that there is no material issue of fact to be tried. (Code Civ. Proc., § 437c, subd. (c); *California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22.) We review a grant of summary judgment de novo to determine whether triable issues of material fact exist. (*Wiener v. Southcoast Childcare Centers, Inc*. (2004) 32 Cal.4th 1138, 1142.)

The appellant has the affirmative burden on appeal of demonstrating that the judgment is infected by prejudicial error. (*Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971; *Mohn v. Kohlruss* (1987) 196 Cal.App.3d 595, 598.) He must "convince the court, by stating the law and calling relevant portions of the

record to the court's attention, that the trial court decision contained reversible error." (*Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710.)

Breach of Fiduciary Duty

Plaintiff contends a triable issue of material fact exists as to breach of fiduciary duty. He acknowledges that a fiduciary duty was not created by virtue of defendant's relationship to him. He contends, however, that "[a] fiduciary duty was created when [he], at the age of 67, called upon his daughter to help him manage his affairs." He "was very ill and was entrusting his daughter to take care of his property from his sickness until his death." Defendant breached this duty when she "put the [condominium] on the market and bought it, and failed to disclose this information to her ailing father."

"A fiduciary or confidential relationship can arise when confidence is reposed by persons in the integrity of others, and if the latter voluntarily accepts or assumes to accept the confidence, he or she may not act so as to take advantage of the other's interest without that person's knowledge or consent." (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101-1102.)

Plaintiff cites no authority in support of his contention that a fiduciary duty was created here. Neither does he cite the record to show that he presented evidence raising a triable issue of material fact. The portions of the record he does cite elsewhere in his brief do not support his contention.

He claims his deposition shows there was no discussion between defendant and himself "regarding the sale of the house." He testified at his deposition that there was no discussion "of *when* the property would be sold." (Italics added.)

Plaintiff also claims his deposition shows that defendant arranged to pay his bills and "assured him that he would not have to worry about taking care of his finances." He was asked at his deposition if he understood that, at the time he transferred title to the property to defendant, the property was not worth the amount he owed the bank on it. He responded, "She said she was going to take care of all the paperwork and I was told not to worry about anything."

Nothing in the foregoing portions of plaintiff's deposition supports a finding that defendant agreed to accept a fiduciary duty to plaintiff. Accordingly, the trial court correctly found that plaintiff did not raise a triable issue of material fact as to breach of fiduciary duty.

Breach of Contract

Plaintiff contends the trial court misunderstood the nature of his breach of contract claim. His claim was based on "the oral contract he entered into with his daughter in which she agreed to accept money from [plaintiff], manage his affairs and pay his bills after his stroke." He acknowledges, however, that "[t]his situation was inadequately explained in the complaint and Opposition to Summary Judgment."

On appeal from a summary judgment, our task is to identify "the issues framed by the pleadings, determine whether the moving party has negated the nonmoving party's claims, and determine whether the opposition has demonstrated the existence of a triable issue of material fact." (*Ohton v. Board of Trustees of California State University* (2007) 148 Cal.App.4th 749, 763, disapproved on another ground in *Runyon v. Board of Trustees of California State University* (2010) 48 Cal.4th 760, 775.) Plaintiff cannot obtain reversal of a summary judgment on the ground his complaint fails to set forth adequately his theory of recovery or his opposition failed to demonstrate the existence of a triable issue of material fact.

Fraud

Plaintiff argues the existence of a triable issue of fact as to fraud, but he does not cite any portion of the record to demonstrate that he presented evidence of what he now argues constituted fraud. In addition, the fraud he now describes is different from that pleaded in his complaint. Consequently, he has failed to demonstrate error in the trial court's ruling as to his cause of action for fraud. (*Ohton v. Board of Trustees of California State University*, *supra*, 148 Cal.App.4th at p. 763; *Culbertson v. R. D. Werner Co., Inc.*, *supra*, 190 Cal.App.3d at p. 710.)

Harassment

The trial court treated plaintiff's causes of action for harassment as claims of intentional infliction of emotional distress. The elements of a cause of action for intentional infliction of emotional distress are "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. [Citations.] . . . [Citations.] Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. [Citations.]" (*Cervantez v. J. C. Penney Co.* (1979) 24 Cal.3d 579, 593; accord, *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494.)

As with his fraud cause of action, plaintiff claims the existence of a triable issue of material fact as to infliction of emotional distress, but he does not cite any portion of the record to demonstrate that he presented evidence of what he now argues constituted the infliction of emotional distress. In addition, the acts he now describes as inflicting emotional distress are to a large extent different from those pleaded in his complaint. Moreover, some of those acts are those that formed the bases of his other causes of action, and as to which he has not demonstrated the existence of a triable issue of material fact. Consequently, he has failed to demonstrate error in the trial court's ruling as to his cause of action for fraud. (*Ohton v. Board of Trustees of California State University*, *supra*, 148 Cal.App.4th at p. 763; *Culbertson v. R. D. Werner Co., Inc.*, *supra*, 190 Cal.App.3d at p. 710.)

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.