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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOHN P. PRINGLE, as Trustee, etc., Plaintiff and Respondent, v. SAMUEL MEYERHOFF, Defendant and Appellant.	B162266 (Super. Ct. No. SC064588)

APPEAL from a judgment of the Superior Court of Los Angeles County, Patricia L. Collins, Judge. Reversed.

Veatch, Carlson, Grogan & Nelson and Cyril Czajkowskyj for Defendant and Appellant.

Roquemore, Pringle & Moore, Inc. and Kenneth Watase for Plaintiff and Respondent.

Samuel Meyerhoff appeals from judgment against him based on negligent misrepresentation. We conclude that under the unchallenged factual findings of the court, the elements for recovery on that theory were not present, and reverse the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Susan and Sam Meyerhoff, a married couple, began living separately in November 1992, although they did not dissolve their marriage nor file for legal separation. They continued to work together in the family business. Sam became involved in a relationship with Barbara Witas.[1] In 1995, through the Meyerhoff Living Trust, Sam and Susan purchased a house at 3063 Deep Canyon Drive. Sam and Witas moved into the Deep Canyon property and lived there together.

On April 17, 1995, Sam wrote Witas the following letter:

"Re: 3063 Deep Canyon Dr.

"Dear Bonnie,

"On January 13, 1995 the above referenced Property was acquired in the name of the Susan and Samuel Meyerhoff Trust. Before its acquisition, at the time of its acquisition and subsequent thereto, we have been living together and sharing our lives. Since approximately March 15, 1995 we have been residing together at the subject property (hereinafter the 'Property') as our home. I make this document voluntarily, of my own free will without duress or undue influence of any person.

"This memorandum shall confirm my intention and our mutual agreement regarding the Property:

"1. You are to have an immediate one-half (1/2) interest in my one-half (1/2) interest, (one quarter [*sic*] 1/4 of the whole) of said Property.

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[1] Ms. Witas is also known as Bonnie. To avoid confusion, we refer to her as Witas.

"2. If you survive my demise for at least thirty days, you are to receive the remaining one-half (1/2) of my one half [*sic*] (1/2) thereby making your total interest in said Property equal to one half [*sic*] of the entire whole provided only that at the time of my death you have either continuously remained living with me at the Property or we are then husband and wife.

"3. The foregoing provisions are intended to provide for you in lieu of any and all other claims to any other property wheresover [*sic*] situated unless said other Property is acquired and held in our joint names subsequent to the date hereof or I have provided for you in a Will dated subsequent hereto."

The letter was typed on the letterhead of Samuel Meyerhoff "Attorney and Counsellor at Law," although Sam had not actively engaged in the practice of law for paying clients since 1986. Sam signed the letter and had it notarized.

In June 1997, Sam executed a will in which he bequeathed to Witas the Deep Canyon property and improvements, as well as all household furnishings and art. He later revoked this will.

By the year 2000, the Meyerhoffs' business was in financial trouble. The Deep Canyon property was security for the business loans, and the Meyerhoffs listed that property for sale during the summer of 2000. During that time, Sam was being treated for severe depression.

In mid-August 2000, Sam and Witas met with attorney Frank Rubin to discuss the transfer of an interest in the Deep Canyon property from Sam to Witas. Rubin prepared a deed which severed the joint tenancy between Sam and Susan. He then prepared a second deed by which Sam purported to transfer his one half interest to himself and Witas. Both deeds were executed on August 25, 2000. The first was recorded on August 29, 2000, the second on August 30, 2000.

After the August 30 deed was recorded, Witas's consent was required for the sale of the Deep Canyon property. She was uncooperative, and Susan ultimately had her

evicted from the property after Thanksgiving 2000. By that time, Sam's condition had deteriorated, and he had moved in with his son in northern California.

In December 2000, Witas brought this action against Sam and Susan, seeking damages for conversion, intentional infliction of emotional distress, abuse of process, invasion of privacy, trespass and defamation. She also sought partition of the Deep Canyon property and specified contents. Susan cross-complained, asserting causes of action for quiet title, removing a cloud on title, cancellation of the August 30 deed, partition, constructive trust, damages and recovery of personal property pursuant to Family Code section 1101, claim and delivery, and conversion.

The Deep Canyon property finally was sold in August 2001, after the Meyerhoffs paid Witas $45,000 for her consent to the sale and paid almost $9,000 to clear a lien for unpaid condominium fees Witas owed on her former residence.

Meanwhile, litigation continued between the Meyerhoffs and Witas. Witas's third amended complaint and Susan's cross-complaint were tried from April 29 to May 13, 2002. The equitable issues were tried to the court, and the legal issues to a jury.

The court found that the Deep Canyon property, having been purchased with community property, was community property at the time Sam executed the deed. Susan had not consented to the transfer to Witas, and therefore was entitled to invalidate the deed. The court also found that Witas was not a good faith improver of the property. The escrow proceeds from the sale of the property were awarded to the Meyerhoffs. As to the disputed items of personal property, the court determined that certain items of were gifts from Sam to Witas, and others were purchased by Witas for herself. These items were awarded to Witas. Other items were awarded to Sam. The court denied Susan's request for reimbursement of the $45,000 paid to Witas to obtain her consent to the close of escrow and the nearly $9,000 for the lien pay off, concluding that the escrow instructions did not provide for such reimbursement.

Witas's case went to the jury on four causes of action: conversion, intentional infliction of emotional distress, breach of oral contract, and negligent misrepresentation.

The jury, in its special verdict, found Susan liable for conversion of Witas's property in the amount of $850. The jury found Sam was not liable for breach of contract, but did find him liable for negligent misrepresentation to Witas as to her interest in the Deep Canyon property. Witas was awarded $53,373.90 as damages for the misrepresentation, which was one-fourth of the proceeds from the sale of the property after outstanding obligations had been paid. Sam and Susan each appealed, but Susan has since abandoned her appeal. Witas, having sought the protection of the Bankruptcy Court, appears through the Chapter 7 Trustee, John Pringle.

DISCUSSION

The theory on which judgment was entered against appellant was negligent misrepresentation. That theory of recovery is grounded in the Restatement Second of Torts, section 552 (hereafter section 552), which provides: "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

Appellant argues that negligent misrepresentation causing economic loss is limited to business and professional representations, and does not include communications rising solely in the context of a personal relationship. We agree. The comment to section 552 speaks of suppliers and users of "commercial information," and the use of information in "commercial transactions." The providers of information in the illustrations for section 552 include a trust company which provides the wrong copy of a will, a newspaper which publishes erroneous information about the efficacy of a drug, auditors, accountants, and banks who report on the financial position or credit-worthiness of companies or individuals, and a seller of real estate lots who supplies misinformation to a real estate

board for inclusion of the board's multiple listing, surveyors. In each instance, the information is supplied for a commercial purpose.

Respondent argues that section 552 applies not only to false information provided in the course of one's business, profession, or employment, but also applies to information provided "in any other transaction" in which the provider of false information "has a pecuniary interest." We find guidance in the comment on subsection (1): "The rule stated in Subsection (1) applies only when the defendant has a pecuniary interest in the transaction in which the information is given. If he has no pecuniary interest and the information is given purely gratuitously, he is under no duty to exercise reasonable care and competence in giving it." (§ 552, com. on subsec. (1), subd. c.) The comment explains further: "The defendant's pecuniary interest in supplying the information will normally lie in a consideration paid to him for it or paid in a transaction in the course of and as a part of which it is supplied. It may, however, be of a more indirect character. Thus, the officers of a corporation, although they receive no personal consideration for giving information concerning its affairs, may have a pecuniary interest in its transactions, since they stand to profit indirectly from them, and an agent who expects to receive a commission on a sale may have such an interest in it although he sells nothing." (§ 552, com. on subsec. (1), subd. d.)

The representations on which respondent bases her claims were discussions she had with Sam at the time the Deep Canyon property was purchased, and the April 17, 1995 letter (quoted in full in the factual statement), which purportedly memorialized the discussions. Respondent testified that Sam "told me that he would have to get the house, purchase the house with Sue because he wouldn't be able to get it on his own. Sue and he would be on the deed. But that I would -- he would then give me half of his share, and he said it was better because then I wouldn't be responsible for payments." Witas was asked, "And what was your arrangement with Sam with regard to him purchasing the home and you sharing it with him?" She replied, "My money was to be used for decorating and for furniture, improvements, and he would pay for the house." This

conversation reflects Sam's intention to purchase the Deep Canyon property, and make a home there with Witas. It does not purport to provide information for Witas's guidance in a business transaction as to which Sam had a pecuniary interest.

Respondent claimed the April 17 letter memorialized these discussions, but nothing in that letter describes mutual obligations with regard to the house. Nor is there any indication in the letter that this was intended to be any sort of business transaction between Sam and Witas. The letter indicates Sam's intent to make a gift of an interest in the property to Witas. The verbal discussions and the letter involve a personal relationship, not a business or pecuniary transaction within the meaning of section 552.

A more fundamental problem precludes liability for negligent misrepresentation. In order to find Sam liable for negligent misrepresentation, the jury had to find that Witas acted in reliance on the representation, and that her reliance was justified. However, the court expressly found that Witas was not a good faith improver of the property. A good faith improver is "A person who makes an improvement to land in good faith and under the erroneous belief, because of a mistake of law or fact, that he is the owner of the land." (Code Civ. Proc., § 871.1.) Under Code of Civil Procedure section 871.3, a court may provide relief to a good faith improver as "consistent with substantial justice to the parties . . . ." (Code Civ. Proc., § 871.3, subd. (b); see also §§ 871.4, 871.5.) The court concluded there was not reasonable reliance by Witas that she had a quarter interest in the property. If she did not reasonably rely on having an ownership interest, then her improvements to the property could not have been made based on justifiable reliance on any negligent misrepresentation by Sam that he had conveyed half of his interest in the property to her.

At oral argument, Witas attempted to avoid this conclusion by arguing that her negligence for purposes of the good faith improver determination should not be imputed to the consideration of justifiable reliance on the misrepresentation cause of action. In support of that position, she cited *Seeger v. Odell* (1941) 18 Cal.2d 409, 414, in which the court held: "Negligence on the part of the plaintiff in failing to discover the falsity of

a statement is no defense when the misrepresentation was intentional rather than negligent. [Citations.] As a general rule negligence of the plaintiff is no defense to an intentional tort." But the court in *Seeger* was dealing with fraudulent misrepresentation; our case involves negligent misrepresentation.

Given the factual finding of the court that Witas did not reasonably rely on having an ownership interest, there was not a factual basis for liability based on negligent misrepresentation. The judgment on this cause of action must be reversed.

DISPOSITION

The judgment against Samuel Meyerhoff for negligent misrepresentation is reversed. Appellant is to have his costs on appeal.

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EPSTEIN, P.J.

We concur:

HASTINGS, J.

CURRY, J.