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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ALAN KAPILOW et al., Plaintiffs and Appellants, v. COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY et al., Defendants and Respondents.	B218012 (Los Angeles County Super. Ct. No. BC378031)

APPEAL from a judgment of the Superior Court of Los Angeles County, Zaven V. Sinanian, Judge. Affirmed.

Steven Helfand and Marcus Daniel Merchasin for Plaintiffs and Appellants.

Gemmill, Baldridge & Yguico, Carlos V. Yguico and Jay Statman for Defendant and Respondent Coldwell Banker Residential Brokerage Company.

Klinedinst and Neil R. Gunny for Defendant and Respondent Allen Sarlo.

DeCastro, West, Chodorow, Glickfield & Nass and Jerry L. Kay for Defendant and Respondent Michael Sarlo.

Law Offices of Ronald Richards & Associates and Ronald Richards for Defendants and Respondents Hai Waknine and Hadar Holdings, Inc.

INTRODUCTION

Plaintiffs Alan Kapilow and Alan W. Kapilow, as Trustee of the AWK Separate Property Trust Dated December 15, 2003, (collectively Kapilow) appeal from a judgment entered after a jury trial. Kapilow contends evidentiary error resulted in the jury's failure to award him any damages. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Introduction*

On June 23, 2005, plaintiff purchased partially developed real property known as the Mount Olympus Project (the Property) from defendants Hai Waknine (Waknine) and Hadar Holdings, Inc. (Hadar). Plaintiff paid $6.2 million for the Property, which was partially developed and sold "as is."

Defendants Allen Sarlo and Michael Sarlo (collectively the Sarlos) through their employer Coldwell Banker Residential Brokerage Company (Coldwell) advised Kapilow regarding the purchase.

Kapilow subsequently learned there were numerous problems with the development on the Property, including a requirement that an environmental impact report be obtained before further development. Kapilow believed these problems rendered the property worth less than what he paid for it and sued to recover the difference.

B. *Third Amended Complaint*

Kapilow's operative third amended complaint contained 14 causes of action. Kapilow asserted causes of action for constructive fraud, fraud, concealment, breach of fiduciary duty and negligence against Coldwell and the Sarlos. He alleged additional causes of action for declaratory relief, negligent misrepresentation, and a petition to

compel mediation or arbitration against Coldwell and Allen Sarlo. He further alleged negligent supervision and negligent entrustment on the part of Coldwell.

Against Waknine and Hadar, Kapilow alleged breach of contract, breach of the covenant of good faith and fair dealing, declaratory relief, fraud, concealment, negligent concealment, a petition to compel mediation or arbitration, civil conspiracy, and joint enterprise.

Kapilow also asserted causes of action for civil conspiracy and joint enterprise against Judah Hertz, Popular Realty and Prosper Levy. They are not parties to this appeal. Hertz and Popular Realty obtained a judgment of dismissal following the sustaining of their demurrer without leave to amend. We affirmed. (*Kapilow v. Hertz* (Oct. 7, 2009, B210947) [nonpub. opn.].)

C. *Evidentiary Dispute*

Kapilow testified at his deposition that the only appraisal of the Property he was aware of was the one that he referred to in his third amended complaint. He alleged the Sarlos obtained an appraisal of the Property, for which he paid. This appraisal valued the property at less than $1.2 million, and the Sarlos withheld this information from him. Kapilow acknowledged that he had not had another appraisal done since then. He had not done any sales comparisons, he had no expertise in real estate acquisition or appraisal.

At trial, following Kapilow's opening statement, Allen Sarlo's counsel moved for a nonsuit, arguing Kapilow did not "offer to prove any recoverable damage." Specifically, his "counsel has not represented to the jury that the property was worth one penny less than 6.2 million or even 7.2 million as of the date of close. And, your Honor, I don't think plaintiffs are prepared to prove that." The trial court decided to defer its ruling until after the presentation of Kapilow's case in chief.

Allen Sarlo's counsel submitted briefing on the issue of proof of damages, arguing that Kapilow's testimony regarding the value of the Property was inadmissible, in that he had not provided a foundation for such testimony. Kapilow's deposition testimony

demonstrated that he did not perform an appraisal of the Property and he was not qualified to do so. Allen Sarlo's counsel also argued that expert testimony was inadmissible unless based on evidence received in court.

During Kapilow's direct examination, he testified that he learned the Property had a value other than what he paid for it. He started to testify that he learned this from the Sarlos' real estate appraisal, when Allen Sarlo's counsel objected based on lack of foundation and asked to speak at the sidebar.

Outside the presence of the jury, Allen Sarlo's counsel explained that "the line of questioning that I interrupted was designed to have Mr. Kapilow tell the jury about that appraisal report. Of course he can't do that. At minimum, they've got to bring the appraisers in. I would request a[n Evidence Code section] 402 hearing. And I'll establish in that . . . hearing that they have no opinion of value for the property in its condition as of summer 2005. They don't have any proof and they don't have any expert witness who can testify as to value as of 2005. And that has always been their burden to prove. . . ."

Kapilow's counsel argued that "with reference to the appraisal report from 2007, Mr. Kapilow is certainly allowed to rely on comparables reflected in the appraisal report in getting an understanding of what he considers his loss to be. [¶] So, for example, in the appraisal report, there are references to comparable land sales in 2005, which is right at the appropriate time. There's also comparable land sales from 2006. And so that is directly on point here in framing value. He's allowed to testify as to what they have said the valuation is, and that frames the loss."

After further argument, the trial court asked Kapilow's counsel to "make an offer of proof of what you expect your client is going to testify to so I know precisely what we're talking about here." Kapilow's counsel said Kapilow would testify that the houses on the Property had to be torn down, "[a]nd there's no value there." Additionally, Kapilow would testify regarding comparable houses. Further, there was the 2007 appraisal report given to Kapilow. "He's entitled to rely on the information in there because, . . . under [Evidence Code sections] 813 and 814, the owner can rely on

evidence, whether or not it's admissible . . . ." Counsel added that Kapilow would testify as to comparables Allen Sarlo gave to him."

Additional argument followed. Ultimately, the trial court agreed with Allen Sarlo's counsel, that if it was intended that Kapilow testify "as an expert witness, and he should have been designated under [Code of Civil Procedure section] 2034. And the lack of such designation will preclude him from testifying about valuation and the very purpose that you would intend to offer him as an expert in this area."

Kapilow later moved for reconsideration. The trial court gave his counsel the opportunity to argue his position. The court then noted that if Kapilow were permitted to testify as to the value of the Property, the defendants would be entitled to a continuance in order to prepare to cross-examine him. Kapilow's counsel added that he would be moving for a mistrial, in that the repeated objections to Kapilow's testimony on the ground Kapilow had not been designated an expert under Code of Civil Procedure section 2034 damaged Kapilow's case.

The trial court responded, "Well, if that's the case, then, . . . let's proceed as we have. And we'll see what the appellate court says if there is a ruling against you in this matter. We'll just go forward with my previous ruling. That under [Code of Civil Procedure section] 2034, a disclosure should have been made. [¶] And I find that under the circumstances, despite your citation of a number of cases, the fact that in deposition, or anytime prior, Mr. Kapilow was not offered as an expert, or you could have revealed that at some point to the defendants, and it was not. And based on the deposition testimony that's been provided to me, it's clear here that your client stated that he has no expertise in this area and he did not do any appraisals." The court therefore decided to stick with its original ruling, and "the appellate court will have to give directions on this issue if, indeed, it reaches that point."

D. *Nonsuit and Verdict*

Following the presentation of the Kapilow's case in chief, Allen Sarlo's counsel moved for a nonsuit on all counts except intentional misrepresentation based on

Kapilow's failure to prove damages. Although Kapilow's counsel argued there was a basis on which the jury could find damages, the trial court granted the motion.

Counsel for Waknine and Hadar also moved for a nonsuit on the same basis. The trial court granted this motion.

Thereafter, the trial concluded. The jury found in favor of the Sarlos and Coldwell. The jury found in favor of Kapilow as to Waknine and Hadar, but it awarded no damages.

DISCUSSION

Kapilow contends he was entitled to give a lay opinion as to the value of his own property. He was not required to be designated an expert witness and disclosed as such prior to trial. We disagree.

Kapilow begins his analysis with Evidence Code sections 813 and 814.[1] Section 813, subdivision (a), in pertinent part provides that "[t]he value of property may be shown only by the opinions of any of the following: [¶] (1) Witnesses qualified to express such opinions. [¶] (2) The owner . . . of the property . . . being valued." Section 814 provides that "[t]he opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to the witness at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in Sections 815 to 821, inclusive, unless a witness is precluded by law from using such matter as a basis for an opinion."

Section 813 is the basis of "the maxim that an owner is always qualified to testify to the value of his own property." (*Contra Costa Water Dist. v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 660-661; *City of Fresno v. Hedstrom* (1951) 103 Cal.App.2d 453, 461.) The owner need not be qualified as an expert to do so. (See *Long Beach City H. S.*

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1 All further section references are to the Evidence Code.

Dist. v. Stewart (1947) 30 Cal.2d 763, 772-773; *Padre Dam Mun. Water Dist. v. Burkhardt* (1995) 38 Cal.App.4th 988, 992-993.) Based on these principles, Kapilow contends he was entitled to testify as to the value of the Property as the owner; there was no requirement that he be identified as an expert witness in order to give such testimony.

The trial court relied on *Fragale v. Faulkner* (2003) 110 Cal.App.4th 229 in ruling to the contrary. In *Fragale*, decided by Division Eight of this court, the plaintiffs purchased a home which they subsequently discovered had serious undisclosed defects. They sued the seller and real estate broker for fraud. (*Id*. at p. 232.) One of the issues before the court was whether one of the plaintiffs should have been allowed to testify as to the value of the home as received. The court found no error in the trial court's exclusion of the testimony. (*Id*. at p. 240.)

The offer of proof as to the proffered testimony was that the plaintiff had visited open houses and looked at sales brochures for other houses in the area. He acknowledged that he was not an appraiser but he nonetheless had an opinion as to the value of his home based on the value of the other properties. (*Fragale v. Faulkner*, *supra*, 110 Cal.App.4th at p. 240.) The appellate court observed that "[t]he point to be proven was 'what the market value of the house would have been had the true facts been known regarding the lack of permits and the lack of compliance with building codes.' [Citation.] Counsel's offer of proof provides no foundation for an opinion from [plaintiff] on that point. The offer of proof shows only that, at some time after the [plaintiffs] purchased the house in August 1998 and before the trial in February 2001, [plaintiff] obtained information on the value of comparable houses in the neighborhood. However, even ignoring the time factor, the offer of proof suggests no basis for testimony on the pertinent point: the effect on market value of the code violations and structural defects." (*Id*. at pp. 240-241, fn. omitted.)

As to section 813, the court pointed out that the opinion an owner may give as to the value of his property is qualified by the requirements of section 814. That is, the opinion "'is limited to such an opinion as is based on matter perceived by or personally known to the witness . . . that is of a type that reasonably may be relied upon by an expert

in forming an opinion as to the value of property . . . .' [Citation.]" (*Fragale v. Faulkner*, *supra*, 110 Cal.App.4th at p. 241.) In the case before it, plaintiffs provided no such basis "for an opinion on the market value of the house as affected by the code violations and structural defects. [Citation.]" In other words, the right of an owner to testify as to the value of his property "is not absolute, and an owner is bound by the same rules of admissibility as any other witness in stating an opinion as to the value of property." (*Ibid*., citing *Contra Costa Water Dist. v. Bar-C Properties*, *supra*, 5 Cal.App.4th at pp. 660-661.)

We agree with the trial court that Kapilow's proposed testimony lacked foundation and therefore was inadmissible under *Fragale*. Kapilow lacked any personal knowledge as to the value of the Property at the time of sale. He could not testify as to the hearsay opinion contained in the 2007 appraisal. (*Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 860, disapproved on another ground in *People v. Ault* (2004) 33 Cal.4th 1250, 1272, fn. 15.)

OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp. (2007) 157 Cal.App.4th 835, cited by Kapilow, does not compel a contrary conclusion. *OCM* reiterates the general rule that "'[t]he opinion of an owner of personal property is in itself competent evidence of the value of that property, and sufficient to support a judgment based on that value. [Citations.] "The credit and weight to be given such evidence and its effect . . . is for the trier of fact." [Citation.]' [Citation.]" (*Id*. at p. 876.) The court applied this rule, and distinguished *Fragale*, on the ground that the witnesses in the case before it "had considerable financial training and experience, [and] they played key roles in [the] purchase of the registered notes." (*Id*. at p. 877.) In *Fragale*, the witness "failed to show that he had any familiarity with information bearing on [the property's] value." (*Ibid*.)

Kapilow, like *Fragale*, "failed to show that he had any familiarity with information bearing on [the property's] value." (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.*, *supra*, 157 Cal.App.4th at p. 877.) For this reason, the trial court properly excluded his proffered testimony as to the value of the property at

the time of purchase as lacking foundation. (*Redevelopment Agency of San Diego v. Attisha* (2005) 128 Cal.App.4th 357, 378; *Fragale v. Faulkner*, *supra*, 110 Cal.App.4th at p. 241.)

Kapilow's claim that the trial court erred in granting a nonsuit is predicated on a finding that the exclusion of his testimony as to the value of the property was erroneous. In the absence of such error, he presents no basis for reversing the judgment.

DISPOSITION

The judgment is affirmed. Defendants are to recover their costs on appeal.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.