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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CLIFFORD J. JOHNSON, Plaintiff and Appellant, v. COLDWELL BANKER REAL ESTATE CORPORATION et al., Defendants and Respondents.	A109721 (Mendocino County Super. Ct. No. SCUK CVG 0185465)

Clifford Johnson sued (a) Coldwell Banker Real Estate Corporation (CBREC), (b) its parent, Cendant Corporation (Cendant), (c) Coldwell Banker Pacific Real Estate, a local Coldwell Banker franchisee (Coldwell Pacific), (d) Bev Dodds, the Coldwell Pacific real estate agent who represented him, and (e) Lenny Balter, the owner of Coldwell Pacific, for alleged misrepresentations in connection with his purchase of a house in Gualala, California. Proceeding in propria persona, Johnson obtained a recovery against Coldwell Pacific for concealing certain physical conditions of the property he purchased, but appeals from a summary judgment in favor of CBREC and Cendant rejecting theories on which he sought to hold them also responsible for his damages. We affirm.

BACKGROUND

According to the operative complaint, in 1999 Johnson purchased a house in Gualala.[1] Dodds was Johnson's real estate agent. Johnson alleged that Dodds and Coldwell Pacific failed to disclose a number of defects in the property: the house sits on a hillside but is not anchored to bedrock, the garage floor was built on improperly filled ground; the septic permit had expired and excavation was necessary to maintain the septic tank; the garage, part of the driveway, the deck, and the downslope retaining wall were built improperly and without permits; the upslope retaining wall was failing and also was built without a permit; and a portion of the driveway belonged to an adjacent landowner who retained the right to rescind access. Johnson alleged that he accepted Dodds' advice not to obtain a soil inspection in reliance "on CB-Cendant's televised and internet publications, and other conduct, stating and imputing that national standards of customer service were assured by the 'Coldwell Banker' trademark."

Johnson alleged separate causes of action against CBREC and Cendant based on theories of ostensible agency, making CBREC and Cendant responsible for the misrepresentations of Coldwell Pacific, and of liability for their own misrepresentations concerning the standards of quality they impose on their franchisees. The trial court granted these defendants' motion for summary judgment and entered judgment in their favor. Thereafter, Johnson filed a document entitled, "Plaintiff's Notice of Intention to Move for New Trial, Else for a Stay of Proceedings," which the court denied. Johnson timely appealed, challenging the judgment and the denial of his motion for a new trial or stay.[2] On appeal, however, he has expressly abandoned his ostensible agency claim, and contests only the summary adjudication upon what he characterizes as his "fraud in advertising" claim against CBREC and Cendant.

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[1] The third amended complaint is the only complaint included in the joint appendix.

[2] Johnson also purports to appeal from the order denying his motion for summary judgment, which is not an appealable order. (*Allabach v. Santa Clara County Fair Assn.* (1996) 46 Cal.App.4th 1007, 1010.) He makes no separate argument as to why the trial court improperly denied his motion for a new trial.

DISCUSSION

We review a grant of summary judgment de novo. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) "Under California's traditional rules, we determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law." (*Ibid.*)

Although Johnson explicitly abandons his ostensible agency claim, his briefs nonetheless make intermittent statements suggesting some reliance on a theory of ostensible agency. We need not grapple with the extent to which Johnson has foreclosed himself from pursuing these arguments since we are satisfied that the trial court properly rejected all of his claims against CBREC and Cendant.

The trial court granted the motion for summary judgment on three grounds. First, it found that "there is nothing in the record to create a triable issue of fact on the agency issue." Second, the court reasoned that "[t]he complaint also fails to state a cause of action for fraud. . . . . The allegations allude to mostly advertising matters, which any person would understand [are] matters of opinion analogous to 'You're in good hands with All State [*sic*]' and 'State Farm is there for you.' These are similar types of hyperbolic statements that nobody can realistically use for a basis for a cause of action for intentional misrepresentation." Finally, the trial court granted judgment on the pleadings on the cause of action for fraud because the claim was "not pleaded with the requisite specificity."[3]

[3] The trial court also noted that much of the evidence submitted by Johnson in opposition to the motion was inadmissible for various reasons. While it listed the procedural infirmities of the opposition as a separate ground for granting the motion for summary judgment, the trial court went on to rule on the merits of the motion. In his appellate briefs, Johnson does not address the state of the evidence below. Since we conclude that the trial court's order was substantively correct, we need not reach these procedural and evidentiary issues.

Civil Code section 2300 provides: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." " 'It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence.' " (*Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399.)

In *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, much as in this case, the plaintiff alleged that Coldwell Banker was liable for the actions of its franchisee. The court there held that there was no actual agency relationship, but that a triable issue of fact existed as to whether Coldwell Banker could be held liable on a theory of ostensible agency. A triable issue of fact existed because the plaintiff "did not notice the small print disclaimer language. Instead, he relied on the large print and believed that he was dealing with Coldwell Banker, i.e., that Coldwell Banker 'stood behind' [its franchisee]. An ordinary reasonable person might also think that [the franchisee] was an ostensible agent of Coldwell Banker." (*Id.* at pp. 747-748.) The court went on to underscore that "Our holding is not a declaration that Coldwell Banker, or other large real estate franchise companies, are routinely fair game for any real estate transaction gone awry. However, where, as here, the plaintiff introduces some evidence raising a triable issue of fact on an ostensible agency theory, such is sufficient to withstand summary judgment." (*Id.* at p. 748.)

In this case, by contrast, Johnson conceded that he read the disclaimer on Coldwell Banker's website that "Coldwell Banker Real Estate Corporation, a subsidiary of Cendant Corporation, . . . has more than 3,000 *independently owned and operated* commercial real estate offices with over 75,000 sales associates globally." (Italics added.) Thus, Johnson either knew that CB Pacific and Dodds were not agents of CBREC and Cendant or, at a minimum, could not reasonably have believed that they were. The trial court correctly

concluded that there was no triable issue of fact precluding summary adjudication of the ostensible agency claim.

The defendants also established that, as a matter of law, none of the statements attributed to CBREC and Cendant upon which Johnson alleged he relied were actionable. The complaint points to statements on the Coldwell Banker website that "CB-Cendant assures service by 'honest and knowledgeable real estate people' who put 'the customer's best interest above all,' so continuing a long 'tradition of integrity, exceptional service, and customer satisfaction that [are] the company's hallmark.' Likewise, [the website] states: 'Our company was founded in 1906 on a commitment to professionalism and customer service that remains the core of our business philosophy.' " Johnson also points to statements on the website that Dodds is a " 'President's Circle Designee, top 5% at Coldwell Banker nationally,' whose motto is 'Care giving is an enormous component of real estate'; and . . . that Balter is a member of the 'President's Circle,' having '28 years in Real Estate, 18 years on the co[a]st, 13 years as owner broker.' " The complaint also suggests, without further specification, that there were other "advertisements of nationally assured standards [that] were intended to obtain money from vulnerable first-time house buyers, including plaintiff, and they were knowingly false . . . ."

The trial court correctly concluded that these statements "are boasts, all-but-meaningless superlatives . . . which no reasonable consumer would take as anything more weighty than an advertising slogan." (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1361.) They are "not the sort of statement that a consumer would interpret as factual or upon which he or she could reasonably rely." (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 835.) To the extent the statements about Dodds and Balter are factual, their veracity was confirmed in the defendants' moving papers and is not disputed. Nor did Johnson produce any other statements that he alleges were fraudulent in opposing the motion for summary judgment. The trial court thus properly concluded that Johnson failed to establish a triable issue of fact as to whether CBREC or Cendant had made statements that would support a cause of action for fraud.

Finally, the trial court was correct that the allegations are too vague to support a cause of action for fraud. "Every element of the cause of action for fraud must be alleged in the proper manner and the facts constituting the fraud must be alleged with sufficient specificity to allow defendant to understand fully the nature of the charge made." (*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 109.) The complaint does not identify specific advertisements nor statements that Johnson believes were fraudulent. Nor did Johnson remedy this defect in his opposition to the motion for summary judgment. Instead, he argued, "It is immaterial whether content that particularly mislead [*sic*] is specified, because plaintiff is alleged as the receptive target of advertising campaign that was intended to and did induce reliance upon specified mistaken beliefs." When asked if he "recall[ed] and relied upon in terms of a televised advertisement or publication," Johnson replied, "Not with specifics, just that I saw it. I saw them, I saw that and Prudential had advertisements at the same time. Those were the two in my mind. And, you know, you can rely on those, the substance of everything." When asked further, "When you observed it and what you observed in terms of televised advertisement[,] can you give me any more detail other than you know you observed it but you don't know what you saw?" Johnson replied, "No." Johnson also argued that his trial exhibits established the needed specificity. He pointed to a transcription of six Coldwell Banker television advertisements. These transcripts are not sufficiently authenticated, their existence does not contradict Johnson's testimony that he does not recall hearing a specific statement on which he relied and, in any event, they do nothing more than repeat the sort of advertising puffery that, as noted above, is not actionable.[4]

Johnson relies on *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640 to establish that he need not show that he relied on a particular advertisement. In that case, the plaintiff could not remember a particular advertisement that induced him to begin smoking. However, the advertisements were themselves in evidence and there was

[4] Moreover, with respect to the discussion of ostensible agency above, several of the advertisements reiterate that Coldwell Banker offices are independently owned and operated.

evidence that the cigarette company had specifically targeted a young male audience, of which the plaintiff was a member when he began smoking. Further, an expert testified about the phenomenon of "associative learning," which the expert explained influences viewers because "even if advertising images remain in the background, and are perceived only in glimpses, repetition causes them to become familiar, creating associations in the minds of people who do not think them through." (*Id.* at p. 1661.) Johnson failed to present any comparable evidence that is even arguably sufficient to overcome the defendants' showing in support of their summary judgment motion.

DISPOSITION

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Parrilli, J.