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**CHARLES DUNN COMPANY INC., Plaintiff and Respondent, v. JACK GRUND,
Defendant and Appellant. AND RELATED CROSS ACTION.**

B146222

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION THREE**

*2002 Cal. App. Unpub. LEXIS 6116***June 28, 2002, Filed**

NOTICE: [*1] NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR PURPOSES OF RULE 977.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, Super. Ct. No. BC215669. Malcolm H. Mackey, Judge.

DISPOSITION: Affirmed.

COUNSEL: Leon Small for Defendant, Cross-complainant and Appellant.

Sullivan, Workman & Dee, Charles D. Cummings and Joseph S. Dzida for Plaintiff, Cross-defendants and Respondents.

JUDGES: KLEIN, P.J. We concur: CROSKY, J., KITCHING, J.

OPINIONBY: KLEIN

OPINION:

Defendant, cross-complainant and appellant Jack Grund (Grund) appeals a judgment following a grant of summary judgment on the complaint filed against him by plaintiff and respondent Charles Dunn Company, Inc. (Dunn), and a grant of summary judgment in favor of cross-defendants and respondents Dunn, Theresa Dunn (Theresa), Robert Harrison (Harrison) and Theodore Slaught (Slaught) (collectively, cross-defendants) on Grund's cross-complaint.

The issues presented relate to whether [*2] a triable issue of material fact exists with respect to (1) Dunn's complaint against Grund for Grund's failure to pay a \$100,000 real estate broker's commission, or (2) Grund's cross-complaint for fraud, breach of fiduciary duty and negligence.

For the reasons set forth below, we conclude Grund has failed to meet his burden of showing the existence of any triable issues and therefore we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In late 1998, Grund contacted Dunn, a licensed real estate brokerage, regarding a possible tax-deferred exchange of real property pursuant to *Internal Revenue Code section 1031*. Grund worked with Theresa, a licensed real estate broker who was working as an independent contractor with the Dunn firm, to find a suitable property.

In April of 1999, brokers Harrison and Slaught of the Dunn firm obtained an exclusive listing agreement for a property in Santa Clarita (the property) from Brad Krasnoff (Krasnoff), a bankruptcy trustee. The property was leased to the Henry Mayo Newhall Memorial Hospital (hospital) and was listed for \$19,125,000.

In order to maximize the proceeds for the bankruptcy estate, the listing agreement provided Dunn would [*3] receive a one percent commission on the first \$18 million of the gross sales price plus five percent of anything in excess of that sum. This was well below the customary commission and therefore Dunn and Krasnoff agreed that Dunn would not be required to split its listing half of the commission on the sale of the property.

On May 6, 1999, Theresa advised Grund of this new listing and that "Buyer has to pay his broker. The property is in bankruptcy."

On May 13, 1999, Grund signed a confidentiality agreement with Dunn which stated in pertinent part: "The

Receiving Party [i.e., Grund] acknowledges that no real estate brokerage fee nor consulting fee will be paid by the Disclosing Party [the seller] for services rendered or representations claimed by any broker or consultant on behalf of the Receiving Party. It shall be the responsibility of the Receiving Party to compensate any real estate broker or consultant claiming a representation of the Receiving Party."

On May 24, 1999, Grund agreed to pay a buyer's commission to Dunn and signed a letter agreement stating: "The purpose of this letter is to guarantee the payment of a sale commission in the amount of \$100,000 to you through [*4] and upon close of escrow in the event I, or one of my assignees, buys the above referenced property."

Grund initially offered \$18 million for the property, Krasnoff countered with an offer of \$18,750,000, and Grund advised Theresa he was willing to increase his offer to \$18.1 million and to stand on that amount. Theresa then informed Grund there was another viable bidder for the property, former football player Roger Staubach, who had offered \$18.5 million. Based on Theresa's recommendation, Grund increased his offer to \$18.5 million. Krasnoff accepted the offer.

The buy/sell agreement disclosed Dunn's role as a dual agent for both Grund and Krasnoff. The agreement did not indicate the amount of the commission the seller would be paying Dunn.

The bankruptcy court approved Grund's offer and escrow closed on August 18, 1999. Grund learned that Dunn was being paid a sales commission by Krasnoff and therefore refused to sign the commission instruction authorizing the payment of the promised \$100,000 commission to Dunn.

1. *Dunn's complaint and Grund's cross-complaint.*

Dunn filed suit against Grund alleging breach of contract. The operative complaint filed August 24, 1999, pled [*5] a single cause of action against Grund for breach of the commission agreement in failing or refusing to pay Dunn a commission of \$100,000 upon the close of escrow.

Grund answered, denied the allegations and pled five affirmative defenses, including an offset of any recovery that Dunn might obtain on the complaint with any recovery by Grund on his cross-complaint, and Dunn's failure to comply with the disclosure requirements of *Civil Code section 2079.16*.

Grund's cross-complaint alleged causes of action for breach of fiduciary duty, fraud and negligence. Grund pled, inter alia: he was fraudulently induced to agree to pay Dunn a \$100,000 commission by the Dunn agents' false representations Dunn would not be paid a commis-

sion by the seller and that Dunn would receive a commission from the sale only if Grund personally obligated himself to pay a commission; he was induced to increase his bid by \$400,000 based upon misrepresentations by Dunn concerning the viability of the Staubach offer; and Grund contemplated managing the tenant hospital but Dunn interfered and sought to undermine Grund's management fees by offering the tenant hospital the same services for half the fees Grund charged. [*6]

In addition, Grund contends Dunn inadequately investigated the value of the property by failing to secure a copy of an existing appraisal.

2. *Dunn's motion for summary judgment.*

On July 13, 2000, Dunn, Theresa, Harrison and Slaughter filed a motion for summary judgment, or in the alternative, for summary adjudication.

With respect to the breach of contract cause of action, the moving papers asserted there was no triable issue of material fact because the terms of the commission agreement clearly state Grund promised to pay Dunn a commission of \$100,000 "through and upon close of escrow" of the property, and Grund's affirmative defense of *Civil Code section 2079.16* was meritless because the statute only governs residential real estate transactions involving one to four units.

With respect to Grund's cross-complaint, the cross-defendants' moving papers asserted, inter alia, Dunn did not misrepresent who would pay the commission, Grund could not show he was damaged by increasing his bid because Grund could not prove Krasnoff would have accepted an offer of less than \$18.5 million, and Grund could not show any damages with respect to the alleged interference by Dunn because Grund [*7] retained the right to manage the property and he continues to manage the property.

3. *Trial court's ruling.*

On September 25, 2000, the trial court granted summary judgment in favor of Dunn as to Dunn's complaint for breach of contract and in favor of the cross-defendants on Grund's cross-complaint in its entirety. The trial court ruled the evidence demonstrated that Grund signed a confidentiality agreement and a letter in which he agreed to pay a \$100,000 sale commission at the close of escrow. The trial court concluded Grund's failure to pay amounted to a breach of contract.

The trial court also found Grund's causes of action for breach of fiduciary duty, fraud and negligence failed because Grund did not present any evidence he was damaged thereby. The trial court found Theresa's alleged misrepresentations that Grund relied upon to increase his

offer from \$18.1 million to \$18.5 million did not amount to fraud because Dunn presented evidence there was a reasonable basis for Theresa to believe the property could not be purchased for less than \$18.5 million.

Further, the trial court rejected Grund's claim Dunn interfered with his right to manage the property in that [*8] Grund had successfully contracted with the hospital to manage the property and continues to manage the property.

Additionally, Grund's claim that Theresa misrepresented to him the sale commission would be paid solely by Grund was found to be meritless. Grund knew Dunn had the listing on the property, knew that Dunn represented both the buyer and the seller, and Grund agreed to compensate Dunn \$100,000 for its role in the transaction.

Finally, Grund's contention Dunn failed to comply with the disclosure requirements of *Civil Code section 2079.16* was meritless because the statute is inapplicable to commercial real estate transactions.

On November 15, 2000, Grund filed a timely notice of appeal. n1

n1 An order granting a motion for summary judgment is a nonappealable preliminary order. Such an order is reviewable on an appeal from the judgment entered thereunder. (9 *Witkin, Cal. Procedure (4th ed. 1997) Appeal § 103*, p. 166.) Here, the record merely contains an order granting summary judgment and lacks a judgment. Although the order presented for review is nonappealable, the matter has been fully briefed and no useful purpose would be served by dismissing the appeal at this juncture. Therefore, we shall address the matter on the merits. To cure the defect, we direct the trial court to enter a judgment nunc pro tunc as of September 25, 2000, the date of the order granting Dunn's motion for summary judgment, and we construe the notice of appeal to refer to such judgment. (*Donohue v. State of California (1986) 178 Cal. App. 3d 795, 800, 224 Cal. Rptr. 57*; *Coe v. City of Los Angeles (1994) 24 Cal.App.4th 88, 91, fn. 3.*)

[*9]

CONTENTIONS

Grund contends: the trial court erred in granting summary judgment on Dunn's complaint and in determining he owed a \$100,000 commission; when a broker fails to disclose to his dual principals that she is being paid by both sides, the broker is not entitled to retain any commission; summary judgment on Dunn's complaint was

improper based upon other misrepresentations by Dunn as itemized in his cross-complaint; and the trial court erred in summarily dismissing his cross-complaint.

DISCUSSION

1. *The grant of summary judgment in favor of Dunn on its complaint.*

a. *The burden of a plaintiff moving for summary judgment.*

In reviewing a motion for summary judgment, we approach the issue by "identifying the issues [as] framed by the pleadings since it is these allegations to which the motion must respond by . . . showing there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading. [Citations.]" (*AARTS Productions, Inc. v. Crocker National Bank (1986) 179 Cal. App. 3d 1061, 1064, 225 Cal. Rptr. 203.*)

Unlike the usual case in which summary judgment is obtained by a defendant, here Dunn, [*10] as plaintiff, obtained summary judgment on its complaint as well on Grund's cross-complaint. The pertinent statute, *Code of Civil Procedure section 437c*, subdivision (o), states: "(o) For purposes of motions for summary judgment and summary adjudication: [P] (1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

We review the trial court's ruling on a motion for summary judgment under the independent review standard. (*Rosse v. DeSoto Cab Co. (1995) 34 Cal.App.4th 1047, 1050.*)

b. *Trial court properly granted summary judgment in favor of Dunn on its complaint.*

(1) *Dunn met its burden in the first instance, so as to shift the burden to Grund.*

As explained below, Dunn, as the plaintiff, met its burden in the first instance by establishing each [*11] element of its cause of action. (*Code Civ. Proc.*, § 437c, subd. (o)(1).)

The elements of a cause of action for breach of contract are: the contract; plaintiff's performance or excuse for nonperformance; defendant's breach; and damage to plaintiff. (4 *Witkin, Cal. Procedure (4th ed. 1997)*

Pleading, § 476, p. 570.)

Here, Dunn's moving papers showed the existence of the contract, namely, the letter agreement wherein Grund promised to pay a \$100,000 commission, Dunn performed the contract by representing Grund in the transaction which was consummated, Grund had breached the contract by refusing to pay the commission, and Dunn had been damaged thereby.

Thus, the burden shifted to Grund to show a triable issue of one or more material facts exists as to the cause of action or a defense thereto. (*Code Civ. Proc.*, § 437c, subd. (o)(1).)

(2) *The sole affirmative defense which Grund placed in issue was based on Civil Code section 2079.16.*

In his answer to the complaint, Grund pled five affirmative defenses: Dunn's failure to state a cause of action; an offset based on Grund's cross-complaint; unclean hands; estoppel; and Dunn's noncompliance with *Civil Code section 2079.16*. However, [*12] of these five affirmative defenses, the *only* one which Grund raised in opposition to Dunn's motion for summary judgment as to the complaint was his fifth affirmative defense, based on *Civil Code section 2079.16*. For example, Grund did not assert the affirmative defense of an offset in his memorandum filed in opposition to Dunn's motion.

Although Grund now seeks to intertwine the issues on the complaint and the cross-complaint, as indicated, the issues on summary judgment are framed by the pleadings. Because the sole affirmative defense which Grund raised in opposition to Dunn's motion for summary judgment as to the complaint was based on *Civil Code section 2079.16*, that is the only affirmative defense before us for review.

(3) *Statutory disclosure inapplicable to commercial real property.*

In resisting Dunn's claim to a commission, Grund seeks to rely on *Civil Code section 2079.16*, which requires the use of a particular disclosure form to advise the parties concerning the real estate agency relationship.

However, as stated in *Smith v. Rickard (1988) 205 Cal. App. 3d 1354, 254 Cal. Rptr. 633*, "the Legislature intended the duties set out in section 2079 to [*13] apply only to brokers selling residential properties of four or fewer dwellings, and not to commercial real estate transactions. . . . [P] The Legislature in enacting section 2079 et seq. attempted to set forth a comprehensive declaration of duties, standards and exceptions and to define 'the duty of care found to exist by *Easton v. Strassburger*, [n2] and the manner of its discharge.' [Citation.] [P] The Legislature intended that this duty of care not apply to the sale of commercial properties or residential proper-

ties with more than four dwelling units." (*Smith, supra, 205 Cal. App. 3d at pp. 1360-1361.*) The rationale is that the Legislature distinguished between residential and commercial properties in order to protect relatively unsophisticated buyers and owners from those with greater knowledge and bargaining power. (*Id. at p. 1361.*) n3

n2 *Easton v. Strassburger (1984) 152 Cal. App. 3d 90, 199 Cal. Rptr. 383*, held "that real estate brokers have an 'affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal. [Fn. omitted.]" (At p. 102.)" (*Smith, supra, 205 Cal. App. 3d at p. 1360.*)

[*14]

n3 See also *Miller & Starr, California Real Estate (2d ed. 1989) section 3:9, page 51* [statutory disclosure statement not required in transactions involving the sale or lease of commercial or industrial property].

This matter involves a sophisticated commercial real estate transaction for \$18.5 million involving a hospital lessee. The statutory scheme of *Civil Code section 2079 et seq.* is plainly inapplicable. Therefore, Grund's fifth affirmative defense was patently meritless and no triable issue exists in that regard. Consequently, the trial court properly granted summary judgment in favor of Dunn on its complaint for breach of contract.

2. *The grant of summary judgment in favor of cross-defendants on Grund's cross-complaint.*

a. *Grund's contentions concerning the cross-complaint are waived.*

With respect to the grant of summary judgment in favor of cross-defendants on Grund's cross-complaint, Grund's opening brief contains the following discussion:

"THE TRIAL COURT ERRED IN DISMISSING SUMMARILY GRUND'S CROSS-COMPLAINT. [P] The essential claims asserted by Grund in his [*15] Cross-Complaint are summarized previously as constituting affirmative defenses and offsets to Dunn's Complaint. Grund's Cross-Complaint, whether viewed as independent defenses to Dunn's Complaint or separate causes of action asserting damage by Dunn, should not have been decided summarily. Grund respectfully urges this Court to overturn the summary judgment on Dunn's Complaint and

Grund's Cross-complaint. Grund respectfully requests an opportunity to try this case before a jury and let a trier of fact make determinations as to who is telling the truth and who is not, what was told to Grund by Theresa Dunn and what was not, whether Grund unnecessarily paid an extra \$400,000 for this Property, whether Grund was informed of a dual commission arrangement, whether Dunn tried to undermine its own principal's efforts regarding management fees, whether Dunn negligently failed to locate an appraisal, and other questions described above."

The above conclusionary discussion is insufficient to preserve for appeal the issues involving the grant of summary judgment in favor of cross-defendants on the cross-complaint. As we stated in *In re Marriage of Schroeder* (1987) 192 Cal. App. 3d 1154, 1164, 238 Cal. Rptr. 12, [*16] "an appellate brief 'should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' (9 *Witkin, Cal. Procedure* (3d ed. 1985) *Appeal*, § 479, p. 469.)"

As indicated, Grund's cross-complaint involved three separate causes of action — fraud, breach of fiduciary duty, and negligence. Grund has not set forth the elements of each of those causes of action, the nature of the evidentiary showing in cross-defendants' moving papers, the nature of the evidentiary showing in Grund's opposition papers, and in what manner the trial court erred in its ruling. Grund has not discussed the contents of the parties' respective separate statements of undisputed facts, which consisted of 59 facts cited by Dunn and nine additional facts cited by Grund.

It is not this court's role to act as backup appellate counsel for Grund in the prosecution of his appeal. (*In re Marriage of Schroeder, supra*, 192 Cal. App. 3d at p. 1164.) Therefore, Grund's contentions relating to the cross-complaint are waived.

b. *In any event, Grund's contentions are meritless.*

Even [*17] assuming all the issues raised in the opening brief were addressed on the merits, the same result would issue.

(1) *Nondisclosure of amount of commission paid by seller to Dunn.*

Grund knew that Dunn had the exclusive listing on the property. In his confidentiality agreement with Dunn, Grund acknowledged the seller would not be paying a commission for services rendered by any broker on behalf of the buyer, and that it would be the *buyer's* responsibility to compensate the *buyer's* broker. Grund agreed in writing to pay a \$100,000 commission to Dunn for its role in the transaction in the event he purchased the property.

The subsequent buy/sell agreement between Grund and Krasnoff on its face disclosed that Dunn was representing both Grund and Krasnoff. *Thus, the dual agency was duly disclosed.*

Because Dunn was representing the seller, a fact of which Grund was well aware, it was self-evident that the seller would be paying Dunn a commission. We reject Grund's contention that Dunn was under an additional duty to disclose to him the *amount* that would be paid by the seller, and that the nondisclosure of that sum relieves him from paying the \$100,000 commission to Dunn [*18] for its role as the buyer's broker.

(2) *Dunn's alleged attempt to undermine Grund's management fee.*

Grund contends a triable issue exists with respect to Dunn's alleged interference in Grund's contractual relationship with the hospital. However, Grund concedes, and the trial court found, that Grund continued to manage the hospital, and that he did not reduce his management fees. Therefore, Grund cannot show any damage as a consequence of the alleged interference.

(3) *Theresa's persuading Grund to increase his offer by \$400,000.*

Grund claims Theresa improperly induced him to increase his offer by \$400,000, and his June 10, 1999 offer of \$18.5 million was due to a misrepresentation by Theresa that he was in competition with another buyer.

In this regard, the evidence shows that two days earlier, on June 8, 1999, NLP-Net Lease Properties, a Staubach partnership, submitted to Dunn a letter of intent to purchase the property for \$18.5 million in cash. A copy of the letter of intent appears in the record. Although Grund argues the letter of intent was merely an illusory inquiry, on this record Theresa had a reasonable basis for advising Grund that unless he increased his [*19] bid to \$18.5 million, he might be outbid. Grund's claim that this advice by Theresa amounted to a breach of fiduciary duty is meritless.

(4) *Theresa's alleged failure to investigate the value of the property.*

Finally, Grund complains Theresa or the Dunn brokers failed to secure a copy of an existing appraisal from Arthur Andersen in Texas, which would have disclosed the value of the property was \$17.9 million.

As a preliminary matter, that appraisal was somewhat stale in that it was dated March 20, 1998, fifteen months before the instant transaction.

Moreover, on this record, Grund cannot show the lack of that appraisal caused him any damage. In his depo-

sition, Grund testified that prior to close of escrow, he believed the property was worth *\$17.5 million* based on its stream of income, or \$1 million less than the price he agreed to pay. Nonetheless, Grund purchased the property because he had only a limited time to complete a 1031 exchange. In sum, Grund cannot show the lack of the Texas appraisal caused him to overpay for the property.

DISPOSITION

The trial court is directed to enter a judgment in favor of Dunn and cross-defendants nunc pro tunc as of September 25, 2000. Said [*20] judgment is affirmed. Respondents shall recover costs on appeal.

KLEIN, P.J.

We concur:

CROSKEY, J.

KITCHING, J.