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Court of Appeal, Fourth District, Division 3, California.

John C. ZAHN et al., Plaintiffs and Appellants,
v.
AAMES HOME LOAN CO., Defendant and Respondent.

No. G027711.
(Super.Ct.No. 795766).

April 30, 2002.
As Modified on Denial of Rehearing May 30, 2002.

Purchaser of debtor's property brought fraud action against potential mortgage lender. The Superior Court, Orange County, No. 795766, David T. McEachen, J., entered nonsuit for lender. Purchaser appealed. The Court of Appeal, Aronson, J., held that there was insufficient evidence to support fraud action.

Affirmed.

Trial court did not act improperly in admitting evidence to disprove the existence of an oral agreement or in submitting that issue to the jury, in purchaser's fraud action against creditor, arising from purchaser's attempt to buy property from debtor.

Trial court's decision to allow potential creditor of residential real estate loan to cross-examine purchaser of debtor's property regarding purchaser's prior bankruptcies was not improper, in purchaser's action against creditor for fraud. [West's Ann.Cal.Evid. Code § 353](#).

There was insufficient evidence to support fraud action, brought against potential creditor of residential real estate loan by purchaser of debtor's property; the creditor did not misrepresent that it would allow the purchaser to assume the debtor's residential real estate loan if it was brought current, nor was there any evidence that purchaser justifiably relief on the loan being assumable.

Jurors were properly instructed on principles of contract law, in fraud action brought against potential creditor of residential real estate loan by purchaser of debtor's property, when trial court instructed the jury that an "agreement for the sale of real property or of an interest therein or an agreement by purchaser of real property to pay an indebtedness secured by a mortgage or Deed of Trust upon the property purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property are invalid unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent;" because the special instruction assumed the existence of a valid agreement, it could have played no role in the panel's deliberations. [West's Ann.Cal.Civ. Code § 1624\(a\)\(3\)\(6\)](#).

Appeal from a judgment of the Superior Court of Orange County, David T. McEachen, Judge. Affirmed.

Richard V. McMillan for Plaintiffs and Appellants.

Malcolm, Cisneros and Houser; Houser & Allison, Eric D. Houser and David C. Carr for Defendant and Respondent.

OPINION

[ARONSON, J.](#)

*1 Plaintiffs John and Annette Zahn sued Aames Home Loan Company for fraud and breach of an oral contract to assume a residential real estate loan. In the wake of a unanimous defense verdict, the Zahns complain of various procedural, evidentiary, and instructional errors. None of their contentions have merit and we affirm.

I

In January 1993, Maria Damicog borrowed approximately \$99,000 from Aames (also known as the Aames Capital Corporation) to finance the purchase of a residence in the City of Garden Grove. The previous owner, Betty Bentley, carried back a portion of the purchase price and agreed to subordinate her debt to the Aames first trust deed.

Damicog defaulted on Bentley's loan sometime before June 1996, and made her last payment to Aames in July of that year. At some point, Damicog deeded the property in lieu of foreclosure to Bentley. Aames recorded a notice of default and election to sell the property on March 14, 1997. The notice listed the original sum of the note, the monthly payment, and stated the sum of \$7,474.90 was due and owing as of March 10.

Sometime in late 1996 or early 1997, John Zahn [\[FNL\]](#) happened upon Damicog's property. Based on his background as a general contractor, Zahn believed he could purchase, repair, and resell the residence at a profit.

[FNL.](#) John's wife Annette is also a plaintiff, but for simplicity we refer to Zahn or plaintiff in the singular.

Zahn's search of the property records turned up Bentley's name. Phone records supplied by Aames apparently showed Bentley took some initial steps to assume Damicog's loan, then abandoned that plan. According to Zahn, Bentley claimed she could not afford to repair the house, and was going to let Aames foreclose on the property. But she allowed him to inspect the premises and eventually agreed to sell the property to Zahn for \$6,000. Zahn wasted little time, moving into the home around March 1997.

Bentley provided Zahn with a loan number and the telephone number of Janice Foxworth at Aames. Zahn claimed he telephoned Foxworth about the property on more than one occasion, but Foxworth denied having any conversations with Zahn. Phone records indicate Zahn called Aames in January 1997, some two months before Foxworth starting working on the file, and asked to buy the note. An Aames employee with the initials "K.B." advised Zahn to send in a written request with a \$250 appraisal fee.

At some point in the fray, Zahn retained the services of Attorney Richard McMillan. McMillan contacted Aames by letter and telephone. At first, McMillan suggested he was representing both Zahn and Bentley in the transaction. He supplied Aames with a copy of a deed from Damicog to Bentley and asked for detailed information about the loan, i.e., the amount needed to cure the default, the current principal balance, assumability, and whether Aames would allow Bentley to sell her interest in the property to Zahn. Foxworth advised McMillan in April that Aames would have to review the escrow file to determine whether the loan was assumable.

Pointing out the dilapidated condition of the property, McMillan proposed the possibility of a "short pay" or "short sale" in which Aames would write off a portion of its loan. He also furnished a cashier's check to cover the appraisal fee. Aames received the appraisal in May, and forwarded it to the loss mitigation unit for processing as a "short sale" assumption. In effect, Aames would reduce the principal balance but the purchaser would continue to make payments due on the loan.

*2 Foxworth told Zahn that Aames engaged in short sales, but the loan would have to be brought current before they could discuss such a proposal. Foxworth supplied the sum necessary to bring the loan current but refused to provide the total sum owed on the loan until he "paid everything up." She informed him the principal owed was about \$92,000.

On May 15, Bentley quitclaimed the property to the Cherry Rainwater Trust (Cherry), although the deed was not

recorded until November 19, 1997. Zahn revealed little in the way of details about this mysterious entity. It appears he was a beneficiary but not a trustee, a strategy he claimed was designed to protect his assets. A business known as Cherry Rainwater Janitorial provided income to the trust. Zahn managed the janitorial business. The trust took title to the property, and also made most of the payments to Aames following the reinstatement of the loan.

On May 19, McMillan sent the following letter and fax to Foxworth and Aames's Julie Martin: "My client's investigation of the condition of [the property] has revealed major building code violations which adversely affects the recent appraisal on the property. My client, a licensed general contractor, has discovered that the breeze-way, which was enclosed without permits or inspection, has no footings and will have to be totally removed. Further, major electrical and plumbing problems exist due to the vandalism over the past months. [¶] My client, John C. Zahn offers to assume the existing loan if you will reduce the principal to \$90,000.00, and in exchange he will the[n] make a reduction in principal of \$20,000.00 upon closing. May we please set a time for a meeting to discuss this matter?"

A few days later, Martin replied, "in response to your letter of [May 19] ... [¶] ... we are the beneficiary and servicer. Any request pertaining to the loan as far as assuming or making an offer, must be presented to the owner of the property." On May 28, McMillan sent another letter and fax indicating he was confused by Martin's letter: "Ames [sic] is the only holder of a security interest in the property.... Ms. Bentley and Mr. Zahn have both been attempting, without and [sic] success, to get Ames [sic] to respond to them concerning this property since October 1996.[¶] The Notice of Default Ames [sic] caused to be recorded on March 14, 1997 identifies Ames [sic] ownership of the Note and Deed of Trust and if Ames [sic] does not wish to discuss a short sale, then I request that you clearly so state and my clients will then exercise their rights prior to the expiration of the 90 day period set forth in Ames' [sic] Notice of Default. May I please have a prompt and direct answer?"

Foxworth telephoned McMillan that same day and advised that his request for a short sale assumption was denied. Aames's computerized phone records documented both the call and the message.

According to Zahn, Foxworth directed him to obtain a cashier's check for \$12,545, advising this was the amount that would stop "actions ... on the loan," provide the appraiser time to finish, and the parties a chance to come to a meeting of the minds on a short payoff. The funds for the check came from attorney McMillan's trust account. Zahn claimed he personally delivered the check to Aames's Orange office on June 12, 1997, but the receipt issued by Aames shows it was received from McMillan, "attorney for the owner." The employee who received the check did not know anything about the underlying transaction, so Zahn told her to call Foxworth. The employee left the room and returned with a receipt marked "Issued manual receipt, check sent directly to Janice Foxworth." Based on his discussions with Foxworth, Zahn understood a portion of this sum included two or three future mortgage payments. Along these lines, the receipt included the following language: " supposed to take care of through Aug '97." On June 23, Foxworth faxed a letter to Damicog, in care of McMillan, stating she had received the sum of \$12,545 but required proof the property taxes were current or she would return the payment and proceed with the foreclosure. McMillan faxed a receipt from the tax collector to Aames the next day.

*3 The loan was reinstated in June, but no monthly mortgage payments were made until November 1997. The records of Aames document, a telephone message sent to McMillan in October, stating a written request was needed for a straight assumption, and advising the June reinstatement only brought the account current through May 1997. Another log entry, dated October 28, stated the loan was not assumable.

On November 28, McMillan sent a cashier's check to Aames for \$4,949.65 to cover the months of June through October 1997. McMillan expressed hope "that at this time the computer information has been changed and that loan statements will be sent to the property address as agreed, but as of this time there has been no statement sent since my client paid the arrearages in June 1997 or for the month of November, 1997.[¶] My client disagrees that this sum of money is owed, and I hereby request a written accounting for this \$,949.65 [sic]. Additionally, my client has yet to receive the assumption package promised in June, 1997. I trust that both these matters will be addressed soon."

Aames accepted the reinstatement payments forwarded by McMillan. But Aames was not receiving regular monthly payments. McMillan pressed Aames for an "assumption package," and urged the lender to treat Zahn as if he was the borrower by sending him loan coupons and statements. Nevertheless, Aames continued to address correspondence to its borrower, Damicog. [\[FN2\]](#)

[FN2](#). As Aames employee Anna Castro explained, "They didn't become our borrower just because they make a payment on the account [¶] ... our borrower is the person who signed the loan documents."

Zahn filed this lawsuit in June 1998. Aames sent an assumption package to McMillan and Damicog in September, and made other efforts to resolve the lawsuit. At trial, neither party objected to the admission of evidence of post-complaint events and settlement efforts.

Zahn's breach of contract theory was amorphous at best. The complaint alleged an oral agreement allowing Zahn to assume the loan if he brought the loan current in June 1997. But Zahn had a different tale to tell at trial, claiming his agreement with Aames was this: "We were never going to go through the assumption of taking over the loan. It was always going to be a short sale. I would just be paying the loan off in its entirety." Later, he explained Aames agreed to provide him with a payoff amount after he paid for the appraiser. Had Aames provided an amount, he would have either paid the loan off or walked away. In response to Aames's motion for a nonsuit, counsel explained "there was an agreement to allow the assumption pending a short sale."

At the conclusion of Zahn's case-in-chief, the court granted a nonsuit on the fraud cause of action, finding plaintiffs provided "no scintilla of evidence" that any fraud had occurred. The jury then returned a special verdict finding plaintiffs had failed to prove the existence of a contract between the parties. This appeal followed.

II

Before trial, Aames moved for judgment on the pleadings, asserting the statute of frauds barred Zahn from proving Aames breached an oral promise that Zahn could assume the Damicog loan. ([Civ.Code, § 1624](#), subd. (a)(6).) [\[FN3\]](#) Zahn opposed the motion, noting the complaint alleged defendant had agreed to let him assume the existing loan for \$12,545 plus the payment of back taxes, and he had made that payment and paid the taxes. This partial performance, he argued, took the case out of the statute of frauds, and Aames was equitably estopped to deny the agreement.

[FN3](#). [Section 1624](#) provides in pertinent part, "(a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: ... (6) An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust upon the property purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property."

*4 The motion was denied by minute order. Neither the order nor the notice of ruling provides any reasons for the decision, but the court's comments at the hearing on the motion suggest it reasoned Zahn's performance, if proven, would operate to estop defendant from asserting the statute of frauds. (See [Dutton v. Interstate Investment Corp. \(1941\) 19 Cal.2d 65, 119 P.2d 138.](#))

Zahn argues the trial judge's "refusal to follow" the earlier ruling was error. The pretrial ruling on defendant's statute of frauds defense, we are told, "resulted in a conclusive presumption of the existence of the oral agreement...."

[\[1\]](#) Nonsense. As Aames counters, the court ruled only that the complaint contained allegations of fact that, if true, would excuse written evidence of a contract. The court could not have ruled, as a matter of law, that there was in fact an oral agreement or an estoppel, as those questions were not before it on a motion for judgment on the pleadings. By no stretch of the imagination did the ruling preclude the admission of evidence to negate the existence of an oral agreement at trial.

In sum, we conclude the trial court did not err in admitting evidence to disprove the existence of an oral agreement or in submitting that issue to the jury. As this veteran jurist remarked, the "testimony at trial" is where "the rubber hits the road." There are no grounds to reverse on this score.

III

Zahn next contends the trial court erred in permitting Aames to cross-examine Zahn on his earlier bankruptcies. But the record reveals there was no objection when counsel for Aames asked Zahn if he had stated on a Freddie Mac loan document (part of the "assumption package") that he had not "been declared bankrupt" within the last seven years. In fact, Zahn had filed for bankruptcy three times in the 1990s. Because he had not sought a complete discharge of his debts but rather a reorganization plan, Zahn believed he had not "been declared bankrupt" within the meaning of the Freddie Mac loan application query.

Aames requested that exhibit 86, the bankruptcy documents, be admitted into evidence. Zahn lodged a "continuing objection" and the court eventually refused to admit the exhibit, but permitted Aames to ask Zahn questions about the documents, e.g., "[d]o you see ... where the [bankruptcy] court, having made findings ... that the debtor, and that's you[] [¶] ... [f]iled two bankruptcy cases?" Counsel asked whether the bankruptcy court had determined he had filed a reorganization plan "without good faith and for improper purpose?" Zahn never answered the question.

[Evidence Code section 353](#) provides, "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

*5 [2] Preliminarily, we note the bankruptcies were not within the scope of Zahn's pretrial motion to exclude evidence of prior litigation involving another savings institution. Because Zahn offered the loan application into evidence and did not object to inquiries about his bankruptcies or his statements on the application, no claim of error was preserved. In any event, cross-examination in this area was proper, as the evidence reflected on Zahn's credibility as a witness. There was no error.

IV

Aames moved for a nonsuit at the conclusion of Zahn's case-in-chief. Plaintiffs' counsel argued the fraud claim was based on "indicia," within Aames's "own records[,] ... that the loan was not assumable. That was not divulged until discovery in this case brought it out in 1999." The court granted the motion as to the fraud cause of action only, finding "there is no scintilla of evidence that there's any fraud in this case."

"A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor.... A mere 'scintilla of evidence' does not create a conflict for the jury's resolution; 'there must be substantial evidence to create the necessary conflict.' " ([Nally v. Grace Community Church \(1988\) 47 Cal.3d 278, 291, 253 Cal.Rptr. 97, 763 P.2d 948.](#))

The elements of fraud giving rise to a tort action for deceit are misrepresentation (false representation, concealment, or nondisclosure), knowledge of falsity (or "scienter"), intent to defraud, i.e., to induce reliance, justifiable reliance, and resulting damage. ([Engalla v. Permanente Medical Group, Inc. \(1997\) 15 Cal.4th 951, 974, 64 Cal.Rptr.2d 843, 938 P.2d 903.](#)) "An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract." ([Lazar v. Superior Court \(1996\) 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981.](#))

Zahn argues the following evidence supported the cause of action for fraud: Foxworth told him Aames "would then negotiate a 'short-sale' " if he paid to reinstate the loan, the loan was assumable, the note was for a fully-amortized 30-year loan, the principal balance owing was approximately \$92,000, and the amount demanded for reinstatement included the monthly payments for June, July, and August 1997.

Zahn testified Bentley, and not Foxworth, told him the loan was assumable. The loan apparently was assumable; Bentley was allowed to pursue that option, but chose to abandon it. Zahn gathered the "impression" the note was a 30-year instrument "[f]rom my conversations with him that it was a standard loan that you would get." But Zahn did not provide the identity of the person who supplied this information. There was no evidence to show Foxworth told Zahn the loan was assumable or that it was a 30 year note. Zahn conceded Foxworth told him she would not discuss a short payoff unless the loan was current and he paid for an appraisal. The \$12,545 payment was to "stop the [foreclosure] actions" and provide enough time to reach an agreement on a short payoff. Zahn never had any intention of assuming the loan.

*6 [3] We think the trial judge made the correct call and agree with Aames that "[n]o possible reading of ... [Zahn's] evidence supports the allegation that Aames misrepresented that [it] would allow the assumption of the loan if it was brought current." Nor was there any evidence Zahn justifiably relied on the loan being assumable. The order granting the motion for nonsuit was proper.

V

Zahn next argues the trial court erred in giving special instruction No. 2 to the jury: "An agreement for the sale of real property or of an interest therein or an agreement by purchaser of real property to pay an indebtedness secured by a mortgage or Deed of Trust upon the property purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property are invalid unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent. [California Civil Code § 1624\(a\)\(3\)\(6\)](#)."

Zahn's lawyer agreed the instruction was a correct statement of the law, but argued it was inapplicable to this case: "At this point we're not talking about whether there's an assumption agreement or not. We're talking about an oral agreement to permit the assumption. I don't dispute that an assumption agreement itself is required to be in writing, but the agreement to either have the short sale or give the payoff or enter into an assumption agreement does not have to be in writing." Aames responded the complaint alleged "Aames entered into an oral agreement whereby Aames agreed to permit [him] to assume the loan. They go on to say that we breached that agreement. All we're saying, assumption agreements need to be in writing. They have got a jury instruction that--which says you can have an oral contract unless otherwise permitted by law. I think we should be entitled to argue it must be in writing. I think for them to try and change what they're saying was breached at the last minute." The court agreed to give the instruction.

Zahn now argues the instruction was the functional "equivalent [of] directing the jury to enter judgment for" Aames. Aames responds any instructional error was harmless: "The jury did not have to consider whether the alleged oral contract was enforceable under the statute of frauds because it found, based on substantial evidence, that there was no contract."

[4] We agree. The jurors were properly instructed on principles of contract law and found the parties did not reach an agreement. Because the special instruction assumes the existence of a valid agreement, it could have played no role in the panel's deliberations here. [\[FN4\]](#)

[FN4](#). In a petition for rehearing, Zahn accurately notes we missed an argument in our original opinion. Zahn complains the court erred in denying his special instruction based on [Evidence Code section 623](#) to the effect that if a party has by statement or conduct intentionally and deliberately led another to believe a particular thing true and to act upon such belief, the party may not contradict it. Any purported error was harmless. As the jury found no agreement, it is not reasonably probable it would have found Aames intentionally and deliberately misled Zahn.

Zahn next complains of the trial court's refusal to give a proposed instruction on the implied covenant of good faith and fair dealing. The court ruled there was insufficient evidence to support such an instruction. We note Zahn bears the burden of providing an adequate record on appeal. Because the proposed instruction is not contained in the record, we cannot review the claim. We also note that if no contract existed, as the jury so found, there could have been no implied promise to act in good faith or act fairly.

*7 Zahn similarly argues the court improperly refused proposed instructions on the law of agency. But this topic was covered in three BAJI-derived instructions given by the court, and Zahn has no right to instructions that replicate other correct statements of the law. There was no error.

The judgment is affirmed. Aames shall recover its costs on appeal.

WE CONCUR: [RYLAARSDAM](#), Acting P.J., and [FYBEL](#), J.

2002 WL 819610 (Cal.App. 4 Dist.) Not Officially Published, (Cal. Rules of Court, Rules 976, 977)

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- [2001 WL 34157257](#) (Appellate Brief) Appellants' Closing Brief (May. 29, 2001)Original Image of this Document (PDF)
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