

FILED

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARMELO GALEA,

Plaintiff-Appellant,

and

ANTHONY W. IMBIMBO, Trustee of the
Carmelo Galea Family Insurance Trust,

Plaintiff,

v.

STEVEN BURGESS, individually; THE
BURGESS GROUP,

Defendants-Appellees,

and

LINCOLN NATIONAL
CORPORATION; THE LINCOLN
NATIONAL LIFE INSURANCE
COMPANY, INC.,

Defendants.

No. 15-56468

D.C. No. 3:11-cv-01218-CAB

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding

Argued and Submitted March 9, 2017
Pasadena, California

Before: PAEZ, BERZON, and CHRISTEN, Circuit Judges.

In this diversity-based action, Carmelo Galea appeals the district court's grant of summary judgment to defendant Steven Burgess on his California state law claims alleging fraud and deceit and professional negligence. We affirm.

1. The district court did not err in granting summary judgment to Burgess on Galea's claim for fraud and deceit. Under California law, the tort of deceit or fraud requires "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Charpentier v. Los Angeles Rams Football Co., Inc.*, 75 Cal. App. 4th 301, 312 (1999) (citation omitted).

Galea alleges that in 2008, he obtained three life insurance policies from Lincoln National Life Insurance Company with a combined value of \$25 million. Galea further alleges that he sought a non-recourse loan to finance the payments, and that Lincoln National's representatives enlisted Burgess to obtain such a loan.

Although Burgess allegedly promised those representatives that the loan would indeed be non-recourse, the loan Burgess ultimately secured held Galea personally liable. But Galea signed a personal guaranty agreement. He maintains that he did not know that he would be personally liable on the loan, and that had he been apprised of the terms of the loan he would never have agreed to it.

There is a genuine dispute of material fact as to whether Burgess ever represented that he would obtain a non-recourse loan. Moreover, as the district court observed, “[e]xcept in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff’s reliance is reasonable is a question of fact.” *Blankenheim v. E.F. Hutton & Co.*, 217 Cal. App. 3d 1463, 1475 (1990).

We agree with the district court, however, that this is such a rare case. Whatever representations Burgess may have made to Lincoln promising that he would obtain a non-recourse loan, we cannot conclude that a reasonable juror could find that Galea *justifiably* relied on them. Galea examined the personal guaranty himself, which declared in capital letters on the front page of the document that it was a “GUARANTY AGREEMENT.” The agreement was a relatively short eight-page document which identified Galea as the guarantor on the first page, as well as on the final page where Galea affixed his signature. Galea

apparently recognized the nature of the guaranty agreement, as he asked his accountant whether the document was a personal guaranty. In fact, Galea declared that his understanding was that he *would* be personally liable for repayment of the loan if he cancelled the life insurance policy, which is essentially what happened when he failed to renew it and the policy lapsed. Given these facts, the district court did not err in concluding that any reliance by Galea on Burgess's alleged representations to others was not justifiable as a matter of law.

2. The district court did not err in granting summary judgment to Burgess on Galea's negligence claim. In the first place, Galea has failed to demonstrate that Burgess owed him a professional duty of care, particularly since Burgess was not in privity with Galea. Galea correctly observes that California courts have, in some instances, recognized that a professional may owe a duty of care to a third party with whom he or she is not in privity. *See Biakanja v. Irving*, 49 Cal. 2d 647, 650-51 (1958). The bulk of the cases on which Galea relies concerned an *attorney's* potential professional liability to third parties not in privity. *See, e.g., Lucas v. Hamm*, 56 Cal. 2d 583 (1961). A few cases, however, have held that other professionals *may* owe a similar duty in some circumstances. *See, e.g., Goonewardene v. ADP, LLC*, 5 Cal. App. 5th 154, 181 (2016), *as modified on denial of reh'g* (Nov. 29, 2016) (holding that "a financial services

provider may be subject to a duty of care to a third party beneficiary of the contract between the provider and its client.”).

But Galea does not, in his Second Amended Complaint, suggest in *what* professional capacity Burgess was acting, aside from observing generally that Burgess presented himself as a “specialist and expert in the field of life insurance premium financing.” It is not alleged, for example, that Burgess was acting as an attorney, or as a financial advisor. Although Galea observes that Burgess is registered as an insurance agent, and proposes that his conduct fell below the standard of care for a life insurance agent, he was not acting as *Galea’s* insurance agent (or anyone else’s) at any point in the transaction. In fact, Galea obtained the relevant life insurance policies before anyone at Lincoln contacted Burgess. Burgess’s role in this particular drama was limited to brokering the loan, not the underlying insurance. Without some indication of the professional capacity in which Burgess was acting, we cannot conclude that he owed a professional duty of care to a third party such as Galea.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Answering Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Reply Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Other**	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
TOTAL:				\$ <input type="text"/>	TOTAL: \$ <input type="text"/>			

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk