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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

YLLKA MASADA, Plaintiff and Appellant, v. ALMADEN TOWER VENTURE LLC, et al., Defendants and Respondents.	H042584 (Santa Clara County Super. Ct. No. CV201721)

The present case arises out of plaintiff Yllka Masada's purchase of a condominium. Plaintiff alleged that the flooring and the window coverings in the newly-constructed condominium had not been properly installed and the condominium smelled of smoke. She brought an action against defendants Almaden Tower Venture, LLC (Almaden), Webcor Builders, Inc. (Webcor),[1] KT Properties, Inc. (KT), Pacific Marketing Associates, Inc. (Pacific Marketing), Spring Capital Group, LLC (Spring Capital), West Santa Clara Associates, LLC (West Santa Clara), and Thielsen Land Company, LLC (Thielsen). After the presentation of plaintiff's evidence, the trial court granted defendants' motions for nonsuit. Plaintiff appeals from the judgment of

[1] Webcor Construction L.P. was sued incorrectly as Webcor Builders, Inc.

dismissal.[2] Plaintiff challenges the trial court's ruling as to the causes of action for breach of contract, breach of the implied covenant of fitness for a particular purpose, and negligence. We affirm the judgment.

I. Factual and Procedural Background

Plaintiff purchased a condominium in the Axis Building in April 2010. After she moved into the condominium in June 2010, she observed that the flooring was improperly installed and the window blinds had gaps. On the first night, she noted that there was a "very strange smell" and she experienced burning in her eyes, nose, and throat. Her discomfort was so great that she was unable to sleep in her bedroom and slept on the balcony.

Plaintiff informed the building manager the following morning about the problem. She eventually attributed the odors to secondhand cigarette smoke. In October 2010, plaintiff moved to another unit so that repairs could be made. However, the repairs were

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[2] Plaintiff's notice of appeal states that she is appealing from an "oral order" granting nonsuit to all defendants. After we informed plaintiff that this court did not have jurisdiction to consider the appeal due to the lack of a judgment or order of dismissal signed by the trial court (Code Civ. Proc., § 581d; *Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 448, fn. 1), plaintiff submitted a judgment of dismissal after a nonsuit motion in favor of all defendants, which was signed by the trial court. Plaintiff's notice of appeal also states that she is appealing from an order granting West Santa Clara's motion to set aside default and default judgment and from an order denying her motion for a new trial. Since plaintiff has not presented any argument on appeal regarding the vacating of the default judgment against West Santa Clara, we deem the issue abandoned. (*Robinson v. Harrington* (1961) 195 Cal.App.2d 126, 127-128 (*Robinson*).) As to the order denying the motion for new trial, this order is not appealable. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.) Even if this court were to treat the notice of appeal as an appeal from the underlying judgment (*ibid.*), plaintiff has not presented any argument on appeal regarding the denial of the new trial motion. Thus, we deem the issue abandoned. (*Robinson*, at pp. 127-128.)

not made because plaintiff thought the scope of repairs would not solve the problem. In June 2011, plaintiff moved out of the building because the problem persisted.

Plaintiff brought an action against Almaden, the owner and developer of the Axis Building, Webcor, the general contractor on the construction project, and Pacific Marketing, which marketed and sold the units. Plaintiff also alleged West Santa Clara and Thielsen were members of Almaden and KT was authorized by Almaden to market the units. Plaintiff brought the action against Spring Capital but did not identify Spring Capital's role in the development or construction of the project.

The operative complaint alleged eight causes of action: (1) breach of contract against Almaden and Spring Capital; (2) breach of implied covenant for a particular purpose against all defendants; (3) rescission against Almaden and Spring Capital; (4) construction defect against Almaden, Spring Capital, and Webcor; (5) fraudulent concealment against all defendants; (6) negligent misrepresentation against all defendants; (7) negligence against all defendants; and (8) negligence - res ipsa loquitur against all defendants.

Following plaintiff's presentation of the case, the trial court granted the nonsuit motions of all defendants.

II. Discussion

A. Plaintiff's Burdens on Appeal

"'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "'This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Ibid.*)

On appeal, a party must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority." (Cal. Rules of Court, rule 8.204(a)(1)(B).) "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*).) The brief must also include appropriate citations to the facts in the record. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655 (*Keyes*).) "Because '[t]here is no duty on this court to search the record for evidence' [citation], an appellate court *may* disregard any factual contention not supported by a proper citation to the record [citation]." (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379 (*Grant-Burton*).)

B. Standard of Review

"'The rule is that a trial court may not grant a defendant's motion for nonsuit if plaintiff's evidence would support a jury verdict in plaintiff's favor. [Citations.] [¶] In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff['s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor . . . ."' [Citation.] The same rule applies on appeal from the grant of a nonsuit. [Citation.]" (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214-1215.)

C. Breach of Contract

Plaintiff contends that the trial court improperly granted defendants' nonsuit motion for breach of contract.[3]

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) A plaintiff must show evidence of a validly formed contract, including the parties to the contract, to establish a breach of contract. (Civ. Code, §§ 1550, 1558.)

Plaintiff argues that she entered into a contract with Almaden in April 2010. But the evidence that she cites in her brief does not mention Almaden. This portion of her testimony establishes only that she signed papers at the Axis Building in April 2010 to complete the transaction. As to Spring Capital, plaintiff cites to the testimony of Tom Connor Jr. that the Connor Wooley Group "operate[s] under the name of Spring Capital Group." She then asserts that Connor's testimony established that the "Connor Wooley Group, operating as [Spring Capital], created defendant Thielsen Land Company specifically for the purpose of developing the Axis project and to be its 'capital vehicle into Almaden Tower Venture.'" Based on this evidence, plaintiff argues that Spring Capital "is ultimately responsible under the contract just as [Almaden] is." However, the testimony to which plaintiff cites does not mention Spring Capital. Connor testified that the Connor Wooley Group has an interest in Thielsen, which was formed by members of the Connor and Wooley families and their spouses. When Connor was asked how

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[3] The second amended complaint alleged breach of contract against Almaden and Spring Capital. On appeal, plaintiff refers only to a contract with Almaden and Spring Capital. Thus, she has forfeited any argument as to Thielsen, West Santa Clara, Webcor, KT, and Pacific Marketing in connection with the breach of contract cause of action. (*Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.)

Thielsen became involved with the Axis project, he responded that it was "formed to be our capital vehicle into Almaden Tower Venture."

Since plaintiff has not properly cited to the record to support her factual contention that Almaden and Spring Capital were parties to the contract for the sale of her condominium, we will disregard this factual contention. (*Grant-Burton*, *supra*, 99 Cal.App.4th at p. 1379.) Accordingly, plaintiff has failed to establish evidence to support her cause of action for breach of contract. Thus, the trial court did not err when it granted the motion for nonsuit as to this cause of action.

Even assuming that the evidence established that Almaden and Spring Capital were parties to the contract with plaintiff, she failed to establish sufficient evidence to support the elements of this cause of action. She presented no evidence of damages or that her damage was proximately caused by Almaden or Spring Capital. In her opening brief, plaintiff merely asserts that she "proved damages in the form of loss of use and enjoyment of the property" and that "the smoke intrusion was so severe that [she] could not live in the units and moved out in October of 2010." She also fails to cite any legal authority to support her claim of damages. Thus, we deem her argument forfeited. (*Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.)

Had plaintiff not forfeited this argument, we would find it had no merit. The statutory measure of damages for breach of contract is "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code, § 3300.) "Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectations of the parties are not recoverable." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515.) In breach of contract claims involving defective construction of a house,

damages are limited to the cost of repairing the house or the diminution in value. (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 561.)

Here, there was undisputed evidence that Almaden would repair the flooring as part of its standard warranty program at no cost to plaintiff. In the event that the floor needed to be completely removed and replaced, there was no evidence of how much such repairs would cost. As to the blinds, plaintiff provided no evidence that Almaden or Spring Capital was responsible for the condition of the blinds or caused damage. There was also no evidence regarding the cost to repair the blinds. Thus, there was no evidence from which a jury could determine the amount, if any, of damages to award plaintiff for the condition of the flooring or the blinds.

Regarding the smoke intrusion into her condominium, plaintiff's counsel conceded that there was no evidence that plaintiff incurred any costs to repair the heating, ventilation, and air conditioning system. She also did not present any evidence that the condominium was worth less than what she paid for it or the amount that it would cost to make any repairs to fix the problem. Nor did she set forth any evidence in her briefing as to any costs for the loss of use of her condominium.

Since plaintiff failed to present sufficient evidence of the damage element of this action, the trial court properly granted the motion for nonsuit for breach of contract.

D. Breach of Implied Covenant of Fitness for a Particular Purpose

Plaintiff also argues that the trial court improperly granted defendants' motions for nonsuit for breach of implied covenant of fitness for a particular purpose. She argues that she purchased the condominium as a place to live and sleep and she could not do so because of the smoke intrusion.

Plaintiff's opening brief regarding this cause of action consists of a single paragraph containing four sentences. She has not cited to the record to support her

arguments. She has failed to provide a single citation to legal authority. She has not analyzed the elements of this cause of action or explained what evidence she produced at trial to support those elements. Accordingly, plaintiff has waived this argument. (*Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.)

E. Negligence

Plaintiff next contends that the trial court erred when it granted defendants' motions for nonsuit for negligence. Plaintiff claims the following evidence established "defendants' duty of care and breach thereof": (1) Max Sherman testified that the ASHRAE standard for high-rise buildings requires "compartmentalization," that is, smoking and nonsmoking areas should be sealed from each other; (2) Sherman observed air coming from a unit adjacent to plaintiff's unit; (3) there was a gap in the concrete wall between these two units that allowed air to go around the concrete wall; (4) Sherman counted "about 50 different penetrations that could allow leakage" into plaintiff's unit; and (5) smoke could be sucked into plaintiff's unit from the adjacent unit because plaintiff's unit had a lower air pressure than the other unit.

Here, plaintiff has not set forth the elements of a negligence cause of action. She has failed to provide evidence, reasoned argument, or legal authority regarding the different roles of defendants, that they owed her a duty that they breached or that their conduct was the proximate cause of any damages that she may have incurred. Thus, this contention has been waived. (*Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.)

III. Disposition

The judgment is affirmed. Defendants are awarded their costs on appeal.

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Mihara, Acting P. J.

WE CONCUR:

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Grover, J.

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Danner, J.

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