APPEAL NUMBERS 23-CV-933 & 24-CV-201

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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CARL BERNSTEIN

Appellant-Defendant,

vs.

LARRY HUANG, *et al.*

Appellees-Plaintiffs.

On appeal from the Superior Court of the District of Columbia
(Judge Yvonne Williams)
2018-CA-006949-B

APPELLANT-DEFENDANT CARL BERNSTEIN'S REPLY BRIEF

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CARL BERNSTEIN
v.
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23-CV-933 & 24-CV-201

TABLE OF CONTENTS

APPELLANT-DEFENDANT CARL BERNSTEIN'S REPLY BRIEF

Cases[1]

[1] Cases principally relied on are represented by an asterisk.

Statutes and Rules

APPELLANT-DEFENDANT CARL BERNSTEIN'S REPLY BRIEF[1]

I. THE HUANGS DID NOT BRING A FRAUDUENT INDUCEMENT CASE AGAINST CARL, BUT THE TRIAL COURT DECIDED THIS CASE AS IF IT WERE A FRAUDULENT INDUCEMENT CASE.

The Huangs argue throughout their brief that their case is based on Carl's alleged false statement that he told them that there were no liens on the property at the time they entered into the original contract. This implies that this case should have been brought as a fraudulent inducement case. However, the Huangs failed to plead fraudulent inducement, but rather filed this case as a fraud and violation of the Consumer Protection Procedures Act ("CPPA") case. At trial, the court ruled that this case is a fraud and CPPA case, not a fraudulent inducement case when it stated:

> "[y]ou're talking about fraudulent inducement, like he's being induced, he induced him into a fraudulent contract. But that is not the claim that I'm charged with resolving here. I am just charged with resolving fraud." [631].

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[1] This Brief will follow the naming convention used by the Superior Court with regard to the parties: "Carl" is Appellant-Defendant Carl Bernstein and "the Huangs" [Appellees-Plaintiffs] are the collective members of the Huang Family – Jim (the father), Yungshi (the mother), Larry (the son) and Samira (Larry's wife). The individual members of the Huang family will be referred to by their first names. Geoffrey Kuck (who also managed the project) will be referred to as "Geoffrey." The 1436 Foxhall Road, L.L.C. will be referred to as the "1436 Foxhall Road LLC." The Consumer Protection Procedures Act will be referred to as the "CPPA."

The numbers inside brackets indicate the page number of the Joint Appendix that supports the statement immediately preceding the brackets.

The trial court further opined:

> "[J]ust because he made statements that were false prior to signing the contract, that could be a claim, but that is not a claim here. That could be an issue, but it's not an issue here. We don't have a false misrepresentation claim or fraudulent inducement claim. As far as I can tell I've got two claims, fraud and CPPA. So we can just stick with the elements of fraud and stick with the elements of CPPA." [631-632].

However, the trial court's order on liability turned the Huangs' claims into a claim of fraudulent inducement when it rested its judgment on a finding based on Larry's testimony that Carl made false statements regarding prior liens on the property that he made prior to the 1436 Foxhall Road LLC entering into the contract with the Huangs. The Huangs acknowledge on page 5 of their brief, that the contract at issue provided that they would buy the property from the 1436 Foxhall Road LLC free of liens. Carl was not a party to the contract at issue. There is no reference to existing liens on the property, only that the Huangs would buy the property free of liens.

Accordingly, even if the trial court had reason to find that Carl made statements concerning prior liens, such statements were not material as the 1436 Foxhall Road LLC only had the duty to deliver the property to the Huangs at closing free of liens. In almost every real estate transfer, there is some sort of lien on the property – a mortgage, a construction loan, a mechanics' lien. The contract at issue itself contemplates that there would be liens on the property that would need to be satisfied at closing:

> ¶25. SELLER RESPONSIBILITY: Seller agrees to keep existing mortgages free of default through Settlement. All violations of requirements noted or issued by any governmental authority, or actions in any court on account thereof, against or affecting the Property at Settlement, shall be complied with by Seller and the Property conveyed free thereof. [332].

Unless the contract required the seller to disclose the existence of liens, there was no duty for the seller (the 1436 Foxhall Road, LLC) to do so. Rather, the duty is for the seller to deliver clear title to the buyer at closing. Therefore, the trial court should not have considered any statements that Carl allegedly made to Larry or for that matter to Larry's father, Jim, before the 1436 Foxhall Road, LLC entered into the contract with the Huangs since the contract contained an integration clause and the Huangs did not include a fraud in the inducement count in their complaint. Thus, since the contract at issue contains an integration clause, the Court of Appeals should remand the case to the trial court with instructions to dismiss all claims for fraud or violations of the Consumer Protection Procedures Act.

II. THE HUANGS' BRIEF DOES NOT REFUTE CARL'S ARGUMENT THAT THE HUANGS FAILED TO ADDRESS ALL OF THE ELEMENTS OF A CAUSE OF ACTION FOR VIOLATIONS OF THE CONSUMER PROTECTION PROCEDURES ACT.

The Huangs' brief does not refute Carl's argument that the Huangs failed to address all of the elements of a cause of action for violations of the Consumer Protection Procedures Act. Larry testified at trial in mere generalities and not with the specific averments required as to the elements necessary to prove violations of

the CPPA. Indeed, Larry never mentioned the CPPA during his testimony at trial, nor did he present written evidence in support of his contentions that Carl violated the CPPA. Additionally, Larry's counsel never specifically addressed the CPPA during the trial, either through eliciting testimony from witnesses or during oral argument. Thus, there was no questioning of Larry in the following manner as required to prove all of the elements of a cause under D.C. Code §28-3901, *et seq.*:

> (1) What statements did Carl make that lead to liability under the CPPA? and
>
> (2) What facts support a finding that Carl is a "merchant" under the CPPA?

Thus, since the Huangs never presented evidence that addressed the elements of a cause of action for violation of the CPPA, there can be no finding that Carl actually violated the CPPA.

Moreover, while it is established that the burden of proof for intentional misrepresentations is the clear and convincing proof standard, *Osbourne v. Capital Mortgage Corp.*, 727 A.2d 322, 325 (D.C. 1999), the Court of Appeals of the District of Columbia has not yet established the burden of proof for unintentional misrepresentations and omissions claims pursuant to the CPPA. *See Caulfield v. Stark*, 893 A.2d 970, 976 (D.C. 2006), finding that the Court of Appeals did not address whether the CPPA embraces claims of unintentional misrepresentation. Carl believes that the clear and convincing standard should apply. The Huangs

brief does not refute Carl's position that the clear and convincing standard should apply as to a cause of action arising under the CPPA. Accordingly, the Court of Appeals should remand this matter to the trial court with instructions to dismiss the cause of action for violations of the Consumer Protection Procedures Act against Carl in its entirety.

III. THE HUANGS' BRIEF DOES NOT REFUTE CARL'S ARGUMENT THAT THE HUANGS FAILED TO ADDRESS ALL OF THE ELEMENTS OF A CAUSE OF ACTION FOR FRAUD.

For the same reasons that the Huangs' claims under the CPPA should be dismissed, the Huangs' claims for fraud should be dismissed – the Huangs failed to address all of the elements of a cause of action for fraud. Specifically, the Huangs failed to present clear and convincing evidence at trial that addressed each and every element of a cause of action for fraud. There was never a point during the trial where Larry addressed all of the elements of the cause of action for fraud under the requirements required in *Pearson v. Soo Chung*, 961 A.2d 1067, 1074 (D.C. 2008):

> (1) What false representation did Carl make?
>
> (2) To what material fact did this false representation relate?
>
> (3) What facts support the contention that Carl made this false representation with knowledge of its falsity?
>
> (4) What facts support the contention that Carl made this false statement with the intent to deceive? and

(5) What action did the Huangs take in reliance upon the representation?

Without addressing each and every one of the elements of a cause of action for fraud, the Huangs cannot prevail in an action for fraud against Carl. The Huangs presented no evidence, but only mere speculation, that, at the time the original contract was signed, Carl did not intend to proceed to settlement once the home was fully built. Rather, common sense dictates that Carl always wanted the 1436 Foxhall Road LLC to proceed to closing with the Huangs, since that was where the 1436 Foxhall Road LLC would receive its profit from the sale of the house (which would be passed on to Carl and Geoffrey Kuck, who also owned an entity that owned the 1436 Foxhall Road LLC along with Carl's entity). Therefore, the Court of Appeals should remand this matter to the trial court with instructions to dismiss the cause of action for fraud against Carl in its entirety.

IV. THE TRIAL COURT ERRED IN HOLDING CARL LIABLE FOR FRAUD EVEN THOUGH HE HAD A GOOD FAITH OPINION OR BELIEF THAT HE COULD DELIVER THE HOME TO THE HUANGS AT CLOSING.

The Huangs failed to present any evidence at trial that contradicted Carl's allegation that he had a good faith belief that he could have delivered the home to the Huangs (even after Geoffrey Kuck, his former associate who took over the project from Carl, said that he could not). The Huangs' claim for fraud against Carl should be dismissed because the allegations of fraud were opinions or predictions

of future events, and thus, did not constitute representations of material fact upon which Plaintiffs successfully may place dispositive reliance.

Carl had a plan to deliver the house to the Huangs even after Geoffrey Kuck (who was managing the property at the end) said that the 1436 Foxhall Road LLC could not go to closing:

> So what I would have done was brought the bank in and say look, there's 3 to $400,000 here that we have to keep other projects which essentially was an advance on those other projects. Move those funds out of here. Reduce the debt, the pay off so that we can deal with the rest of it. I would have taken Lance Estes who is a very close friend. Moved his trust out of there. And we would have been left with contractors very few of whom would have had lien rights. I mean, very few had lien rights. We could have gotten insurance, the title insurance company to issue a mechanics lien policy to the Huangs protecting them against any future mechanics liens. [Geoffrey] and I could have guaranteed that personally. Larry has already testified that he was ready to come up with some money. [Geoffrey] and I spent hundreds of thousands on legal bills. We could have -- it was easy. It was easy. [883-884].

Carl was asked, "[a]t the time [Geoffrey] took over the project did you believe that you, you meaning [the 1436 Foxhall Road LLC], were capable of closing [on the Huangs' home] in the near term?" to which Carl testified, "Oh, absolutely." [887]. The following exchange shows that Carl had a good faith belief that he would have been able to deliver the home to the Huangs as promised by the 1436 Foxhall Road LLC:

> Q: At each point in time when the Huangs paid funds into the project was it your belief that the [Huangs' home] could have been delivered to them in accordance with the terms of the contract?
>
> A: Yes.

Q: And for not one penny more I think was the term used?

A: Not one penny more. My phrase of one penny more had to do with something else. That's out of context.

Q: We're not talking about the –

A: Oh, okay.

Q: But you could have delivered?

A: Yes.

Q: When they put the money in it was your belief that the project would have been completed and they would have received their house?

A: I would have done it. If it wasn't for [Geoffrey] wanting to take over and finish it himself, I would have done it. I would have met with Larry and Jim and we would have resolved it. [890].

In *Howard v. Riggs National Bank*, 432 A.2d 701, 706 (D.C. 1981), the court found that "[o]pinions or predictions of future events do not constitute representations of material fact upon which a plaintiff successfully may place dispositive reliance." In *Bennett v. Kiggins*, 377 A.2d 57, 61 (D.C. 1977), the court found that:

> "[a] promissor's representation or a representation as to future events asserted in a common law fraud action, should only be considered a misrepresentation of fact where the evidence shows that the promise was made without the intent to perform, or that the promisor had knowledge that the events would not occur. When a person positively states that something is to be done or is to occur, when he knows the contrary to be true, the statement will support an action in fraud. On the other hand, a prophecy or prediction of something which it is

> merely hoped or expected will occur in the future is not actionable upon its nonoccurrence."

Thus, the Huangs' claims against Carl should be dismissed because the allegations of fraud were opinions or predictions of future events, and thus, do not constitute representations of material fact upon which the Huangs could successfully place dispositive reliance. The Huangs did not prove, and the trial court did not find, that Carl did not have a good faith and sincere belief that the 1436 Foxhall Road LLC could have delivered the home to the Huangs at closing by working with lienholders and subcontractors to eliminate the funding shortfall.

V. THE HUANGS' BRIEF DOES NOT REFUTE CARL'S CLAIMS THAT HE IS NOT RESPONSIBLE FOR THE FAILURE OF A THIRD-PARTY TITLE COMPANY TO RECORD A SECOND TRUST IN THE HUANGS' FAVOR.

The Huangs' brief does not refute Carl's claims that he is not responsible for the failure of a third-party title company to record a second trust in the Huangs' failure. At a minimum, Carl is entitled to a setoff for the damages incurred by them as a result of Stewart Title's failure to record the Huangs' lien. In fact, the attempt by the Huangs to record their lien (a second trust) refutes the unbelievable claim made by Larry at trial that Carl told them the property was free of any liens prior to the execution of the progenitive contract. The Court of Appeals should remand this matter to the trial court to dismiss all claims against Carl, or at a minimum, direct

the trial court to recalculate damages that were based on Stewart Title's failure to record the Huangs' lien.

VI. THE HUANGS' BRIEF CLAIMS THAT CARL DID NOT REFUTE ALLEGATIONS OF WRONGDOING AT TRIAL, BUT THE TRUTH IS THAT HE DID.

On page 23 of their brief, the Huangs state "Judge Williams found that although Larry's testimony was the only evidence of Carl's oral misrepresentations, Carl did not refute these allegations at trial." However, Carl did refute these allegations:

> Q: At the time [the] money came in, did you make any statements to any of the Huangs that were untrue?
>
> A: No.
>
> Q: Did you make any false representations to them concerning your abilities or the fact that you were going to build them a house?
>
> A: No.
>
> Q: Did you make any statements that were untrue as to any material fact to that contract?
>
> A: No.
>
> Q: If you didn't make any false statements, then there was no falsity or intent in your mind, was there?
>
> A: Absolutely not.
>
> Q: And you had no intention to deceive anyone?
>
> A: Absolutely not. [759].

Q: Did you ever make any representations to [Larry] that were false?

A: No.

Q: Did you ever make any representations to him in reference to a material fact that you knew to be false?

A: No.

Q: Did you ever make any representations to him with the intention to deceive?

A: Absolutely not.

Q: Did you ever fail to disclose any material facts to him?

A: No. [765].

Q: Now, at all times you took the draw money, and at all times you spent it, you had every intention to deliver a home, did you not?

A: Absolutely. Absolutely. Absolutely. Absolutely.

Q: Before we go into the emails, was it always your intention in your interaction with Mr. [Jim] Huang in California (Larry's Father) or Mr. Larry Huang or his future wife, was it always your intention to deliver that home?

A: Yes, absolutely.

Q: During all your conversations going over almost a 2-year period, did you ever make any material misrepresentation to him?

A: Never.

Q: Did you ever lie to him?

A: Never.

Q: Did you ever try to deceive him to get more money?

A: No. [768-769].

Therefore, Carl did, in fact, rebut each and every one of the Huangs' allegations during the trial in this matter.

VII. THE HUANGS' BRIEF DOES NOT REFUTE CARL'S CLAIMS THAT HE IS NOT LIABLE FOR MONEY PAID BY THE HUANGS FOR CHANGE ORDERS OR AMENDMENTS FOR WHICH CARL WAS NOT FOUND LIABLE.

The trial court only found that Carl committed fraud or violated the CPPA with regard to the original contract, the Tenth Amendment, and Change Order #9. However, the trial court included, in its monetary award, money paid by the Huangs for other amendments and change orders. The Huangs conclusory statement that "There is no doubt that from an operational basis, Carl was the party primarily in charge of the Project" is not supported in law or in fact; therefore, if any judgment of liability should remain after appeal, the Court of Appeals should remand this matter to the trial court with instructions to remove, from any award of damage, all money paid by the Huangs with regard to amendments and change orders other than the Tenth Amendment, and Change Order #9 where Carl was not found liable for fraud or for violating the CPPA and adjust the attorney's fee award accordingly.

VIII. WHERE THE SUPERIOR COURT RELIES ON DICTA FROM AN ORDER DENYING A MOTION TO DISMISS OR A MOTION FOR SUMMARY JUDGMENT, THE DICTA THAT LED TO THE SUPERIOR COURT'S FINAL JUDGMENT ORDER MUST BE APPEALABLE.

On pages 23-26 of their brief, the Huangs argue that the issue of the integration or entireties clause was decided by the initial judge in this case on motion to dismiss and later on summary judgment. In its order dated April 17, 2019 [153-163] denying the motions to dismiss filed by Carl and then-Defendant Geoffrey Kuck, the court stated:

> "The Court finds that the amended complaint sufficiently pleads a claim for fraud against Mr. Kuck and Mr. Bernstein. Mr. Kuck and Mr. Bernstein filed separate motions to dismiss with both primarily making the argument that the Amended Complaint insufficiently pleads the fraud claim, that the Sales Agreement was fully integrated, and that their statements were opinions of future events." [157].

Other than this single statement, Carl believes that the order denying the motion to dismiss does not further discuss the integration or entireties clause.

Next, on October 20, 2020, the court issued an order denying Carl's motion for summary judgment [320-327]. This order contained the following statement with regard to the integration or the entireties clause:

> "Defendant also argues that because the contract at issue contained an integration clause, the Plaintiffs cannot rely on any statements not in the contract. Further, the statements that were the basis of the fraud count were opinions or predictions of future events, not material facts that the Plaintiffs should have relied on. Both arguments were previously addressed by this Court in the Omnibus Order issued on April 17, 2019. As previously stated, both arguments are unpersuasive." [326].

As with the order denying the motions to dismiss, the order denying the motion for summary judgment did not further discuss the integration or entireties clause.

The Huangs included an extensive transcript passage at pages 23-25 of their brief that shows that the trial court believed that it was bound by the prior decisions in the order denying the motions to dismiss and the order denying the motion for summary judgment with regard to the integration or entireties clause:

> Q: The contract in April 2017 contained what's called an entireties clause, would you agree?
>
> A.: I don't know what that is.
>
> MR. CHARDIET: Your Honor, objection. He's going into legal issues which Judge Lopez has already decided is not relevant here in his order.
>
> MR. J.P. SZYMKOWICZ: That was on the summary judgment.
>
> MR. CHARDIET: Correct.
>
> MR. J.P. SZYMKOWICZ: That doesn't mean that it's not relevant here at trial.
>
> BY MR. J.P. SZYMKOWICZ:
>
> Q: Mr. Huang, there was a statement within this contract and in the statement states: This contract must –
>
> THE COURT: What contract is this? What section are you at?
>
> MR. J.P. SZYMKOWICZ: It's the entireties clause.
>
> THE COURT: But what page is that?

MR. J.P. SZYMKOWICZ: It's toward the end, Your Honor. It might be the last paragraph.

MR. CHARDIET: Your Honor, page 7 of Judge Lopez's order and denial of the motion specifically addresses this issue. It said that it should not be part of the case. Defendant argued that because the contract at issue contained an integration clause, plaintiff cannot rely on any statements not in the contract. The statements that were the basis of fraud counts were opinions open, not material facts the plaintiff should have relied on. Both arguments were previously addressed by this Court in the order issued on April 17, 2019. As previously stated, both arguments are unpersuasive. I would argue that this is the law of the case.

THE COURT: Right. So that means it's not an issue of fact that's been resolved. That's a legal issue. That's not a question of fact, which why your motion for summary judgment was not granted. And it was not granted on that issue at all. So, it's just a question of law.

MR. J.P. SZYMKOWICZ: Your Honor, so we are clear, I cannot ask about the entireties clause?

THE COURT: If it's already been resolved by Judge Lopez –

MR. CHARDIET: It has twice.

THE COURT: Then the issue is a legal question that has already been resolved by Judge Lopez. It's not an issue. It's something that is an issue of fact that we can talk about whether or not Mr. Huang is bound by that statement. It has already been resolved.

MR. CHARDIET: It's called the law of the case, Judge.

THE COURT: I know what that is. I'm not talking about that. What I'm saying is if it has already been resolved that the case is going to move forward in spite of that integration clause because a legal determination has already been made that it does not void Mr. Huang's arguments, then we don't need to address it.

MR. J.P. SZYMKOWICZ: Your Honor, this was our motion for summary judgment.

THE COURT: Right.

MR. J.P. SZYMKOWICZ: I don't believe that they made a motion on that issue.

MR. CHARDIET: This was in result of your –

THE COURT: But your motion for summary judgment was denied; right?

MR. J.P. SZYMKOWICZ: Correct.

THE COURT: Which means –

MR. CHARDIET: What was –

THE COURT: Counsel, counsel. Which means that the Court has already decided that your argument related to the applicability of the integration clause does not win the day. There is nothing there to -- it has legally been resolved. So, it can go forward, because your motion for summary judgment was denied. It can't go forward.

MR. J.P. SZYMKOWICZ: But our argument is that that was just on summary judgment. That we could ask that at trial. Summary judgment is something different.

THE COURT: No, summary judgment establishes whether or not there are any issues of fact; right?

MR. J.P. SZYMKOWICZ: Correct.

THE COURT: And so, if your motion for summary judgment was -- you were arguing what, that there were no issues of fact with respect to whether what? What was your argument?

> MR. J.P. SZYMKOWICZ: That's correct, the entireties clause. And the fact that there is an issue of fact whether this clause is in the contract. I think we can ask that question, Your Honor.
>
> THE COURT: But the clause is in the contract.
>
> MR. J.P. SZYMKOWICZ: It is.
>
> THE COURT: That's not an issue of fact. It's in the contract. Whether or not Mr. Huang is bound by it given the behavior of Mr. Bernstein is a question of fact. [635-639].

Carl believes that the trial court should not have considered that it was bound by the dicta in the order denying Carl's and Geoff's motions to dismiss and the order denying Carl's motion for summary judgment and could not consider Carl's arguments on integration anew at trial because the point of an order on a motion to dismiss is to hold that the complaint filed by the plaintiff has set forth sufficient facts to proceed to discovery and the point of an order on a motion for summary judgment is that the opponent to that motion has set forth sufficient disputed facts upon which trial is necessary to resolve. In neither order does the court decide as a matter of law or fact whether the integration or entireties clause wins or loses the day for either Carl or the Huangs. Therefore, the trial court committed clear reversible error in considering itself "bound" by the dicta present in the two previous orders, and thus, this matter of the integration or entireties clause should be remanded to the trial court for further proceedings.

A. The Huangs present no District of Columbia case in support of their argument that denials of motions to dismiss are not reviewable on appeal.

On pages 12-17 of their brief, the Huangs claim that "the Court's denial of the motion to dismiss is not appealable," but do not cite any case from the District of Columbia to support their argument. Rather, they only cite *Bennett v. Pippin*, 74 F. 3d. 578 (5th Cir. 1996). Since the Huangs have failed to cite any District of Columbia case, Carl believes that a denial of a motion to dismiss *is* appealable in the District of Columbia – especially, where, as here, the trial court considered itself bound by dicta in the order denying the motions to dismiss regarding the integration or entireties clause. Of course, Carl believes that the Huangs' complaint should have been dismissed at the motion to dismiss stage because the complaint failed to set forth specific statements that Carl made that supported claims for fraud and violations of the Consumer Protection Procedures Act.

B. The dicta regarding the integration or entireties clause in the order denying Carl's motion for summary judgment is reviewable on appeal.

In *Morgan v. American University*, 534 A.2d 323, 328-29 (D.C. 1987), the court found that:

> "[A]though we announce today a general rule that denial of summary judgment after a trial and final judgment is not an appealable order, as a case of first impression, we do not foreclose the possibility that the clear abuse of discretion standard or one of the exceptions recognized in other jurisdictions might apply in an appropriate case where review of a denial of summary judgment would not defeat the fundamental purpose of judicial inquiry."

In addition, the court in *Morgan* found that "any legal rulings made by the trial court at summary judgment affecting that final judgment can be reviewed." *Id.* at 327. Therefore, the dicta regarding the integration or entireties clause in the order denying Carl's motion for summary judgment is reviewable on appeal.

CONCLUSION

Appellant-Defendant Carl Bernstein respectfully requests that this Honorable Court reverse the trial court's orders and judgments in this case and remand for dismissal of the Huangs' civil action against Mr. Bernstein in its entirety.

Respectfully submitted,

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Certificate of Service

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