

Litigation Due Diligence Analysis

Holzboog v. Vega

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Prepared by JG

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1. SUMMARY

This matter involves Elsy Holzboog’s (“Client”) sale of the real property located at 1898 Hampton Dr., Hanford, CA 93230 (the “Property”)¹ to Miguel Vega and Judith Diaz (“Vega”), who was not only the buyer, but also the real estate agent who represented Client in the sale of the Property. Vega persuaded Client to drop the sales price and then purchased the Property himself. Client believes that Vega did not act in her best interest and intentionally deceived her to purchase the Property below fair market value while paying himself commissions.

2. PARTIES/SIGNIFICANT FIGURES

Name of Party / Significant Figure	Significance to Underlying Matter/Dispute
Elsy Holzboog, as trustee of the *** Trust. . . .	Client/Plaintiff.
Dale Holzboog, as trustee of the *** Trust. . . .	Prior joint owner of Property.
Miguel Vega	Realtor/Defendant.
Judith Diaz	Joint buyer of Property.
Stewart Title	Escrow company.

The table above may be amended from time to time to reflect revisions to Client’s narrative and/or new information that may become available in the future.

¹ The Property was held in trust at the time of the sale.

3. NOTABLE PROVISIONS IN RELEVANT AGREEMENTS

Document Article / Section No.	Relevant Text of the Selected Article / Section No.
Residential Listing Agreement, section 10	A. Broker agrees to exercise reasonable effort and due diligence to achieving the purposes of this Agreement. Broker is authorized, but not required to . . . advertise and market the Property by any method in an any medium selected by Broker, including MLS and the Internet. B. Broker agrees to present all offers received for Seller's Property. And present them to Seller as soon as possible . . .
Residential Listing Agreement, section 12	C. Depending upon the circumstances, it may be necessary or appropriate for Broker to act as an agent for both Seller and buyer . . .
Residential Listing Agreement, section 18	In any action, proceeding, or arbitration between Seller and Broker to enforce the compensation provisions of this Agreement, the prevailing Seller or Broker shall be entitled to reasonable attorney fees and costs from the non-prevailing Seller of Broker, except as provided in paragraph 22(A).
Residential Listing Agreement, section 22	A. Seller and Broker agree to mediate any dispute or claim arising between them regarding the obligation to pay compensation under this Agreement . . .
Purchase Agreement and Joint Escrow Instructions, section 2(D)	The Parties each acknowledge receipt of a Possible Representation of More than One Buyer or Seller — Disclosure and Consent (CAR Form PRBS).
Purchase Agreement and Joint Escrow Instructions, section 3M(2)	Seller intends to occupy the Property until close of escrow.
Purchase Agreement and Joint Escrow Instructions, section 18(A)	Seller or Buyer, or both as applicable, agree to pay compensation to Broker as specified in a separate written agreement between Broker and that Seller or Buyer . . .
Purchase Agreement and Joint Escrow Instructions, section 18(B)	Buyer and Seller acknowledge and agree that Agent: (i) does not decide what price Buyer should pay or Seller should accept; (ix) shall not be responsible for determining the fair market value of the Property.
Purchase Agreement and Joint Escrow Instructions, section 22	In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller, except as provided in paragraph 30(A).
Purchase Agreement and Joint Escrow Instructions, section 30(A)	The Parties agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court of action. The mediation shall be conducted through the C.A.R Real Estate Mediation Center for Consumers or through any other mediation provider or service mutually agreed to by the Parties. The Parties also agree to mediate any disputes or claims with Agent(s) who, in writing, agree to such mediation prior to, or within a reasonable time after, the dispute or claim is present to the Agent. Mediation fees, if any, shall be divided equally among the parties involved, and shall be recoverable under the prevailing party attorney fee clause. If for any dispute or claim to which this paragraph applies, any Party (i) commenced an action without first attempting to resolve this matter through mediation; or (ii) before commencement of an action, refuses to mediate after a request has been made, then that Party shall not be entitled to recover attorney fees . . .

Purchase Agreement and Joint Escrow Instructions, section 31(A)	The Parties agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration. The Parties also agree to arbitrate any disputes or claims with Agent(s) who, in writing, agree to such arbitration prior to, or within a reasonable time after, the dispute or claim is presented to the Agent . . .
Possible Representation of More than One Buyer or Seller – Disclosure and Consent (CAR Form PRBS)	Dual Agency: If Seller is represented by Broker, Seller acknowledges that broker may represent prospective buyers of Seller’s property and consents to Broker acting as a dual agent for both seller and buyer in that transaction. If Buyer is interested in acquiring and consents to Broker acting as a dual agent for both buyer and seller with regard to that property. . .
Disclosure Regarding Real Estate Agent Relationship (CAR Form AD)	SELLERS AGENT To the Seller: a fiduciary duty of utmost care, integrity, honesty and loyalty in dealing with the Seller. To the Buyer and the Seller: (a) Diligent exercise of reasonable skill and care in performance of the agent’s duties. (b) A duty of honest and fair dealing and good faith. . . .
Arbitration Agreement (undated) [See “Keysafe Lockbox Addendum (p. 20)]	The parties agree that any dispute or claim in law or equity arising, or having arisen, between them out of the Listing Agreement or any resulting transaction which is not settled through mediation, shall be decided by neutral, binding arbitration . . .

This table may be amended from time to time if and when new applicable documents come to light. To the extent that such new document(s) necessitate(s) any significant revisions to Client’s litigation strategy, where applicable, the Firm will work with Client to develop a new strategy.

4. STATEMENT OF FACTS/EVIDENTIARY SUPPORT

Date / NA	Fact	Evidence Supporting That Fact
March-April 2022	Client retained Vega to represent her in the sale of the Property.	Retention notes
In or about 4/1/22	Vega listed Property for sale for \$610,000.	Retention notes
4/8/22	Vega convinced Client to drop Property’s price to \$605,000 due to “no bites.”	Retention notes; Modification Agreement
Unknown	Vega asked Client to lower Property’s price to \$596,000. She refused.	Retention notes; VS’ notes
4/12/22	Client and Dale Holzboog executed Trust Advisory (CAR form.)	Trust Advisory

4/26/22	Vega made an offer to buy Property for \$605,000. Client accepted.	Retention notes
5/3/22	Client executed instructions to pay commission authorizing that \$27,225 in commissions be paid to Vega on behalf of Century 21 Jordan-Link.	Instructions to Pay Commission
5/3/22	Client acknowledged that “Miguel A. Vega is a real estate licensee acting as a principal in this transaction.”	Supplemental Escrow Instructions
6/7/22	Escrow closed.	Retention notes; Closing Statement
	<p><u>Miscellaneous:</u></p> <ul style="list-style-type: none"> — After an inspection of the property, Vega said he would take care of all repairs. He brought in workers while Client’s belongings were still on the property & items were stolen. — Vega selected inspector, escrow co, title co etc. He told Client the sale was closed, Client got no notice or closing documents, she just believed him. — Vega didn't offer Client a rent back, which she needed because her new purchase wasn't closed yet. May have taken possession of the property before it closed. — Vega was in and out of the property saying she wasn’t moving out fast enough starting 6/3/2022. — Several weeks after Client moved out, and spending thousands on hotels her new purchase (8080 12th Ave) closed & she did not have funds required by the lender to complete the purchase. — According to Client, Vega listed the Property on the market. According to Zillow search, no MLS listing # was associated with the Property when it was on the market. Redfin search states “Sold (MLS) on 6/7”. — According to Client, prospective buyers came with their own agents to see the Property. — According to Zillow search, comparable homes were sold for similar or lower values around the time of the incident. — It appears that Vega is a real estate agent in good standing. His license is active, he has not been disciplined and his reviews are decent. 	Retention notes; VS’ notes

This table may be amended from time to time as new information/evidence comes in. To the extent that such new information necessitates any significant revisions to Client’s litigation strategy, where applicable, the Firm will work with Client to develop a new strategy.

5. ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENT

The Firm should follow up with Client regarding the following items/issues:

- Did Client ever ask Vega to include a rent-back clause in the Purchase Agreement?
- When did Client move out of the Property?
- Does Client know if Vega scheduled any showings in an effort to sell the property?
- What is the name of Client's trust (not stated in Trust Advisory)

This section of the LADD may be amended from time to time as new information becomes known.

6. ADDITIONAL DOCUMENTS NEEDED FROM CLIENT

The Firm should request Client to provide the following documents:

- Proof of payment of hotel costs
- Chronology of events

This section of the LADD may be amended from time to time if Client locates additional documents.

7. THIRD-PARTY DOCUMENTS/INFORMATION KNOWN TO EXIST

Client believes that one or more third parties have possession, custody, control, and/or knowledge of the following documents/information.

Document/Information	Significance of the Document/Information	Identity of Third Party in Possession of the Documents
Communications between Vega and prospective buyers	May reveal whether Vega made any significant efforts to sell the Property.	Miguel A. Vega

The table above may be amended from time to time as new information comes to light.

8. POTENTIAL CAUSES OF ACTION

Based upon the allegations made by Client thus far and based upon the facts and evidence provided by Client and/or reflected in the documents the Firm has received and reviewed, the potential causes of action discussed below appear to be applicable.

8.1. Breach of Contract

Elements

- “The essential elements of a claim of breach of contract, whether express or implied, are the contract, plaintiff’s performance or excuse for non-performance, defendant’s breach, and the resulting damages to plaintiff.” (*Darbun Enterprises Inc. v. San Fernando Community Hosp.* (2015) 239 Cal.App.4th 399, 409; *San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 439.)

Remedies

- Compensatory (money) damages are available for all expected harm caused by the breach. (Civ. Code, § 3300.) In other words, damages must be reasonably foreseeable. (Civ. Code, § 3300; *Erlich v. Menezes* (1999) 21 Cal.4th 543.)
- Emotional distress damages are generally *not* available *unless* the breach caused bodily harm or a serious emotional disturbance was a particularly likely result. (*Erlich v. Menezes*, *supra*, 21 Cal.4th at 558; *Plotnik v. Meihous* (2012) 208 Cal.App.4th 1950 [breach of settlement agreement by hitting dog with baseball bat].)
- Specific performance is an available remedy for breach if the non-breaching party desires to affirm the contract. (Civ. Code, § 1680; *Kassir v. Zahabi* (2008) 164 Cal.App.4th 1352.)
- Rescission (accompanied by restitution) is available in certain circumstances. (Civ. Code, § 1692.) Mutual rescission is available if all parties consent. (Civ. Code, § 1689(a).) Unilateral rescission is available by statute for mistake, fraud, duress, undue influence, failure of or void consideration, or if the contract is unlawful or against public policy. (Civ. Code, § 1689(b).)

- As to whether attorneys’ fees are available to the prevailing party, see “Attorneys’ Fees and Costs” section below.

Applicable Statute of Limitations

- For breach of verbal contracts, the statute of limitations is two years. (Code Civ. Proc., § 339.)
- For breach of *most* written contracts, the statute of limitations is four years. (Code Civ. Proc., § 337)
- For breach of *negotiable instruments* (e.g., promissory notes), the statute of limitations is six years. (Comm. Code, § 3118.)

Application

- See relevant provisions in Purchase Agreement and Disclosures and Listing Agreement listed above. Given the evidence at the Firm’s disposal, it does not appear that Vega breached any contractual provisions.

Conclusion

- Given the evidence at the Firm’s disposal, Client does not have a viable claim for breach of contract.

8.2. Breach of Fiduciary Duty

Elements

- The elements of a claim for breach of fiduciary duty are: (i) the existence of a fiduciary relationship; (ii) its breach; and (iii) damage proximately caused by that breach. (*Tribeca Companies, LLC v. First American Title, Ins.* (2015) 239 Cal.App.4th 1088.)
- It is well settled in this state that the law imposes on a real estate broker the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary.” (*Ford v. Cournale*, 36 Cal.App.3d 172, 180) The California Supreme Court said in *Batson v. Strehlow*, 68 Cal.2d 662, that “(t)his relationship not only imposes upon him the duty of acting in the highest good faith towards his principal but precludes the agent from obtaining any advantage over the principal in any transaction had by virtue of his agency. (Citation.) ‘Such an agent is charged with a duty of fullest disclosure of all material facts concerning the transaction that might affect the principal’s decision. (Citations.)’ ” (*Id.*, pp. 674-675.)
- Real estate brokers have the duty to be honest and truthful in their dealing. (Bus. & Prof. Code, §§ 10150, 10176; *Rattray v. Scudder* (1946) 28 Cal.2d 214, 222–223, 169 P.2d 371.) *See also Nguyen v. Scott* (1988) 206 Cal.App.3d 725.

Remedies

- If the breach results in damage to property, available compensatory damages are the cost to remedy defects and for loss of use during the period of injury. (*Raven's Cove Townhomes Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 802.)
- Civil Code § 3333: “For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.”
- Equitable remedies such as constructive trust, rescission, and restitution are available when the defendant has been unjustly enriched by the breach. (*Miester v. Mensinger* (2014) 230 Cal.App.4th 381.)
- Punitive damages may be available if the breach constitutes constructive fraud. (Civ. Code., § 3294; *Hobbs v. Bateman Eichler, Hill Richards Inc.* (1985) 164 Cal.App.3d 174.)

Applicable Statute of Limitations

- A claim for breaching a fiduciary duty must be brought within four years of the breach. (Code Civ. Proc., § 343; *William L. Lyon & Assoc, Inc. v. Sup. Ct.* (2012) 204 Cal.App.4th 1294, 1312.) If the breach of fiduciary duty stems from the defendant's fraud (even if pleaded as breach of fiduciary duty), which has a statute of limitations of only three years, the claim must be brought within three years. (Code Civ. Proc., § 338; *Professional Collection Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 691.)

Application

- By executing CAR Form PRBS, Client consented that Vega act as a dual agent (i.e. representing Client and the buyer – here, himself – in the transaction [*See, e.g. Bus. And PC section 10176(d); Whitehead v. Gordon* (1970) 2 CA3d 659.]) While it is not illegal that a real estate agent buy their own listing, Vega still owes fiduciary duties to Client in acting as her real estate agent. Vega is clearly obligated to act in Client's best interest.
- If Client can prove that Vega: (i) mislead Client about the value of the Property or the state of the real estate market (e.g. by claiming there were no qualified/interested buyers, persuading her to drop the price – although it appears that Vega did list the Property on MLS); (ii) rushed Client through the transaction; (iii) didn't make any efforts to sell the Property as he was more interested in purchasing the Property himself (e.g. conducted no showings); and/or (iv) intentionally failed to include a rent-back clause in the Purchase Agreement, Client may have a viable claim for breach of fiduciary duty.

— At this time, it is unclear whether Vega: (i) made any significant efforts to sell the Property (according to Client, prospective buyers came with their own agents to see Property); and (ii) intentionally failed to include a rent-back clause in the PA (or if Client ever requested that, or how Vega would directly benefit from that). It should be noted that according to a Zillow search, it does not appear that the Property was sold below FMV. Further, Client acknowledged in writing that Vega was acting on his own behalf in the transaction (See Supplemental Escrow Instructions). Additionally, Vega provided Client with a Disclosure Regarding Real Estate Relationships. The foregoing is arguably sufficient to waive the conflict of interest that arose.

— It may, however, be argued that Vega did not act in Client's best interest because, *inter alia*: (i) he persuaded Client to drop the sales price after one week (i.e., there was not enough time to assess the market conditions); and (ii) he did not include a rent-back clause purchase (the Firm needs to ask Client if she ever requested that Vega include such a clause).

— Client's damages resulting from these breaches will be calculated as follows: hotel expenses (+-\$25,000) + commissions paid to Vega (\$27,225) + difference between FMV and purchase price (if any).

Conclusion

— Given the evidence at the Firm's disposal, Client has a viable claim for breach of fiduciary duty.

8.3.

Breach of Implied Covenant of Good Faith and Fair Dealing

Elements

- The elements of a claim for breach of the implied covenant of good faith and fair dealing are: (i) the existence of a contract; (ii) the plaintiff's performance of the contract or excuse for nonperformance; (iii) the conditions required for the defendant's performance occurred or were excused; (iv) the defendant unfairly interfered with the plaintiff's right to receive the benefits of the contract; and (v) the plaintiff was harmed. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350; *Racine & Laramie, Ltd. v. Dept. of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032.)
- Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. (Rest.2d Contracts, § 205.) "The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith. [Citations.]" (*Carma Developers (Cal.), Inc., v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372.) "All that is required for an implied covenant claim is the existence of a contractual or relationship between the parties. (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49.)
- The "implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose." (*Schoolcraft v. Ross* (1978) 81 Cal.App.3d 75;

accord *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 401.) A “breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself.” (*Congleton v. National Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 59.) Indeed, “breach of a specific provision of the contract is not . . . necessary’ to a claim for breach of the implied covenant of good faith and fair dealing.” (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244.) The essence of the good faith covenant is objectively reasonable conduct. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779.)

- The duty of a contracting party under the covenant of good faith and fair dealing is to act in a commercially reasonable manner. (*California Pines Property Owners Assn. v. Pedotti* (2012) 206 Cal.App.4th 384, 394-396; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779.)
- While *tortious* breach of the implied covenant is generally restricted to the insurance context, it is possible to establish such a breach *outside* the insurance context if: (i) the breach is accompanied by a common law tort (e.g., fraud, conversion, etc.); (ii) the means used to breach the contract (or its implied covenant) are tortious (e.g., involving deceit or coercion); or (iii) a party intentionally breaches the contract (or implied covenant) with the intent/knowledge that such a breach will cause severe and unmitigable harm to the other party in the form of mental anguish, personal hardship, or substantial consequential damages. (*Erlich v. Menezes* (1999) 21 Cal.4th 779.)

Remedies

- General contractual remedies are available, including compensatory (money) damages. (Civ. Code, § 3300.)
- Tort damages are generally unavailable for real estate related matters other than leases and wrongful eviction claims that are classified as torts. (*Ginsburg v. Gamson* (2012) 205 Cal.App.4th 873.)

Applicable Statute of Limitations

- Same as breach of contract. Four years for written contract (Code Civ. Proc., § 337), two years for oral contract (Code Civ. Proc., § 339), and six years for negotiable instrument (e.g., promissory note) (Comm. Code, § 3118).

Application

- Although it appears that Vega did not expressly breach any contractual provisions, it may be argued that Vega acted unreasonably and unfairly interfered with Client’s right to receive the benefits of the Purchase Agreement and/or Listing Agreement should the evidence reveal that Vega did not act in Client’s best interest when representing her in the sale of the Property (*See* analysis re breach of fiduciary duty above, also applicable here.) The potential conflict of interest and Vega’s overall conduct are problematic, at best, resulting in damages to Client.

Conclusion

— Given the evidence at the Firm’s disposal, Client has a viable claim for breach of the implied covenant.

8.4.

Fraud (Intentional Misrepresentation)

Elements

- The elements of a cause of action for intentional misrepresentation are: (i) a misrepresentation; (ii) made with knowledge of its falsity; (iii) with the intent to induce another’s reliance on the misrepresentation; (iv) actual and justifiable reliance; and (v) resulting damage. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166; *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 230-231.)
 - A false representation is the suggestion, as a fact, of something untrue by one who does not believe it to be true. (Civ. Code, § 1710(1).) In general, the statement must be of a past or present fact, not opinion, estimates or speculation. (*Neu-Visions Sports Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 308-310.)
- The elements of an action for fraud and deceit based on a concealment are: (i) the defendant must have concealed or suppressed a material fact; (ii) the defendant must have been under a duty to disclose the fact to the plaintiff; (iii) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (iv) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; (v) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. (*Marketing West Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal. App.4th 603, 612-613.)
- A promise made without intending to fulfill it—i.e., “promissory fraud”—is also actionable as fraud. In this situation, the “fact” being misrepresented is the speaker’s present intention to perform. (Civ. Code, § 1710(4); *Engalla v. Permanente Med. Group Inc.* (1997) 15 Cal.4th 951, 973 [a promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud].)
- Defendant must know the statement is false or act with reckless disregard of its truth or falsity. (*Lazar v. Sup.Ct. (Rykoff- Sexton Inc.)* (1996) 12 Cal.4th 631, 638; *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 415 [scienter requirement satisfied if defendant has no belief in truth of statement and makes it recklessly, without knowing whether it is true or false].)
- Civil Code section 1709—“One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.”

- Defendant must intend to induce the other party to act in reliance on the false information. (Civ. Code, § 1709; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith Inc.* (1998) 68 Cal.App.4th 445, 481.)
 - Although Civil Code section 1709 does not list “reliance” as a required element of deceit, plaintiff must plead and prove that he or she actually and justifiably relied on defendant’s misrepresentation. (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1091.)
- Civil Code section 1710—Defines deceit (as used in § 1709), and includes three different types of deceit, including a promise made without any intention of performing (see above). Actual reliance is a component of “justifiable reliance.” (*Garcia v. Superior Court* (1990) 50 Cal.3d 728, 737.) A plaintiff must have been justified in believing defendant’s statements. (*Gray v. Don Miller & Assocs. Inc.* (1984) 35 Cal.3d 498, 503.) Actual reliance is shown if the misrepresentation substantially influences plaintiff’s decision to act. (*Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 678.) A plaintiff who does not believe the representations made to him or her cannot establish actual reliance. (*Buckland v. Threshold Enterprises Ltd.* (2007) 155 Cal.App.4th 798, 806-808.)
- There are three considerations in determining reasonable reliance. First, the representation or promise must be material, as judged by a reasonable person standard. (*Charpentier v. Los Angeles Rams* (1999) 75 Cal.App.4th 301, 312–313.) Second, if the matter is material, reasonableness must take into account the plaintiff’s own knowledge, education, and experience; the objective reasonable person is irrelevant at this step. Third, some matters are simply too preposterous to be believed by anyone, notwithstanding limited knowledge, education, and experience. (*Blankenheim v. E. F. Hutton, Co. Inc.* (1990) 217 Cal.App.3d 1463, 1474.)
- Forbearance can constitute reliance if plaintiff decided not to do something based on the misrepresentations. (*Small v. Frist Cos. Inc.* (2003) 30 Cal.4th 167.)
- While the standard to determine the reasonableness of the reliance is subjective (i.e., the “reasonable person” standard doesn’t typically apply, and thus being gullible is often not a bar to establishing reliance)—*Brownlee v. Vang* (1965) 235 Cal.App.2d 465—there is a limit to that subjective standard. A plaintiff cannot rely on representations that are so preposterous and “so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.” (*Blankenheim v. E.F. Hutton & Co. Inc.* (1990) 217 Cal.App.3d 1463, 1474.)
- Plaintiff must plead and prove that defendant’s fraud was the cause of plaintiff’s injury (*Service by Medallion Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818) and that his or her damages were proximately caused by defendant’s tortious conduct (Civ. Code, §§ 1709, 3333, 3343; *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 65-66.)

Remedies

- Different measures of compensatory (money) damages are available depending upon the nature of the claim. In general, for compensatory damages, defrauded plaintiffs are limited to the “out-of-pocket” measure of damages, which seeks to restore plaintiffs to the financial position they were in before the fraud occurred. Plaintiffs receive the difference in value between what they gave to defendant and what they received. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226 [damages include difference between value given and value received, plus consequential pecuniary loss caused by reliance on misrepresentation].)
- **For claims involving the purchase, sale, or exchange of real property, Civil Code section 3343 governs. Essentially, the plaintiff is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he or she received, together with any additional damages arising from the particular transaction, including any of the following: (i) amounts actually and reasonably expended in reliance upon the fraud; (ii) an amount that would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud; and (iii) where the defrauded party was induced by reason of the fraud to sell or otherwise part with the property in question, an amount which would compensate him or her for profits or other gains that might reasonably have been earned by use of the property had he or she retained it.**
 - Additional damages are available for lost profits if the plaintiff was tricked into selling an income property. (Civ. Code, § 3343(a)(4).)
 - The statute does not permit a plaintiff to recover the difference between the value of the property as represented and the actual value of the property, nor does it prevent the plaintiff to obtaining equitable remedies he or she might also be entitled to. (Civ. Code, § 3343(b).)
 - In real property transactions, emotional distress damages are not recoverable. (Civ. Code, § 3343.)
- For fraud involving fiduciary relationships, a broader spectrum of damages is available, typically benefit of the bargain damages. (Civ. Code, §§ 1709, 3333.)
- Damages for emotional distress are available for some types of fraud that don’t involve real property. (*Sprague v. Frank J. Sanders Lincoln Mercury, Inc.* (1981) 120 Cal. App. 3d 412, 417 [“general damages for mental pain and suffering are recoverable in a tort action of deceit”].) For negligent misrepresentation cases, no emotional distress damages are available *unless* plaintiff suffers physical injury. (*Branch v. Homefed Bank* (1992) 6 Cal.App.4th, 793, 798-799.)
- Punitive damages are awardable where plaintiff shows by clear and convincing evidence that defendant was guilty of oppression, fraud, or malice. (Civ. Code, § 3294(a); *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154; *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 790; *Branch v. Homefed Bank*, *supra*, 6 Cal.App.4th at 799.)

Applicable Statute of Limitations

- Where the essence of a claim is that defendant's act constituted actual or constructive fraud, the claim is subject to the three-year limitations period. (Code Civ. Proc., § 338.)
- Otherwise, the statute of limitations is four years. (Code Civ. Proc., § 343; *William L. Lyon & Associates Inc. v. Sup. Ct.* (2012) 204 Cal.App.4th 1294, 1312.)

Application

- See analysis re breach of fiduciary duty above (also applicable here). If Client can prove that: (i) Vega intentionally misrepresented that Property was worth less than initial asking price (assuming that it true); and/or (ii) Vega intentionally misrepresented that there were no interested buyers and/or did not relay all offers to Client; and/or (iii) Vega intentionally failed to include a rent-back clause in the Purchase Agreement and/or indicated that he could not do so for any reason, despite Client's request, Client may have a viable claim for fraud (misrepresentation or concealment). As noted above, however, it does not appear that the Property was sold below FMV. It is unclear whether there were, in fact, no interested buyers as stated by Vega. It is also unclear whether Vega intentionally failed to include a rent-back clause in the purchase agreement. Client's reliance would be justified, as she had a fiduciary relationship with Vega and relied on his expertise as a real estate agent.

Conclusion

- Given the evidence at the Firm's disposal, Client has a viable claim for fraud.

8.5. Unfair Business Practices

Elements

- A claim brought under Bus. & Prof. Code, § 17200 et seq. is really an unfair competition claim, and the statute is sometimes referred to as the "Unfair Competition Law." (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 558.) It is not the same thing as a common law unfair competition claim, the essence of which is the "the inequitable pirating of the fruits of another's labor and then either 'palming off' those fruits as one's own (deception) or simply gaining from them an unearned commercial benefit." (*KGB, Inc. v. Giannoulas* (1980) 104 Cal.App.3d 844, 850; *Bank of the West v. Sup.Ct.* (1992) 2 Cal.4th 1254, 1263.)
- This statute is specifically intended to remedy anti-competitive activities (e.g., monopolies) and unfair (e.g., dishonest, deceptive, fraudulent, or discriminatory) business practices. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 179.)

- The passage of Prop. 64, however, greatly narrowed the use (i.e., abuse) of this cause of action. Prior to the passage of Prop 64 (i.e., November of 2004), standing to bring a claim under 17200 did *not* depend upon a showing of damages. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228.) After the passage of that proposition—which imposed a number of limitations on a private party’s standing to bring such a claim—a private party was required to (i) establish a loss or deprivation of money or property sufficient to qualify as injury in fact (i.e., an economic injury), and (ii) show that the economic injury resulted from an unfair business practice or false advertising. (*Kwikset Corp. v. Sup.Ct.* (2011) 51 Cal.4th 310, 322.)
- Today, a plaintiff wishing to make a claim for unfair business practices must prove that the defendant: (i) engaged in an unlawful, unfair, or fraudulent business practice/act; or (ii) used unfair, deceptive, untrue, or misleading advertising; or (iii) violated an act prohibited under Business and Professions Code section 17500 et seq. (See Bus. & Prof. Code, § 17200 et seq.; see also *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1146.) Plaintiff must not only also establish damages, but plaintiff must also prove that those damages were caused by the unfair competition at issue. (*Kwikset Corp. v. Sup. Ct., supra*, 51 Cal.4th at 322.)
 - If plaintiff is arguing that defendant engaged in an “unlawful” business act or practice, plaintiff must (i) specify the unlawful conduct (which may be based on federal, state, or local law); (ii) show that defendant committed the unlawful business practice/conduct; and (iii) show that defendant unjustly received ill-gotten gains, including plaintiff’s money or property, as a result of the business practice/act. (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 676.)
 - “Fraud” under Business and Professions Code section 17200 et seq. means conduct that is likely to deceive the public. (*Prata v. Superior Court, supra*, 91 Cal.App.4th at 1146.)

Remedies

- Plaintiff may obtain injunctive relief to prevent the unfair competition and/or to order defendant to return any money or property that may have been unlawfully acquired. (Bus. & Prof. Code, §§ 17200, 17203.)
- Plaintiff is not, however, entitled to compensatory, actual, or punitive damages. (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371.)

Applicable Statute of Limitations

- A claim for unfair business practices/competition must be brought within four years. (Bus. & Prof. Code, § 17208.)
- Any cause of action brought under 17200 is entitled to the benefit of this four-year statute of limitation. *Thus, an unfair competition claim can revive claims that are otherwise time-barred by shorter statute periods* (e.g., failing to pay wages is an unfair business practice so the four-year statute of

limitations applies, not the three-year limitations). (*Cortez v. Purolator Air Filtration Production Co.* (2000) 23 Cal.4th 163, 178.)

Application

— See above analysis re breach of fiduciary duty and fraud. Again, if Client can prove that Vega intentionally misled her to sell the Property to him (i.e., that his overall conduct was deceptive), she may have a claim for unfair business practices.

Conclusion

— Given the evidence at the Firm's disposal, Client has a viable claim for unfair business practices.

8.6.

Interference with Prospective Business Advantage

Elements

- The elements of the tort of *intentional* interference with prospective business advantage are: (i) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (ii) the defendant's knowledge of the relationship; **(iii) intentional acts on the part of the defendant designed to disrupt the relationship**; (iv) actual disruption of the relationship; and (v) economic harm to the plaintiff proximately caused by the acts of the defendant. (*Port Medical Wellness, Inc. v. Connecticut General Life Insurance Company* (2018) 24 Cal.App.5th 153, 182-183; *Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1005.)
 - With respect to the third element (intentional acts designed to disrupt the relationship), a plaintiff "must show that the defendant engaged in an independently wrongful act." (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1545 citing *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1152.) This means that the defendant's interference has to include wrongful conduct *other than* the fact of the interference itself. (*Ibid.*)
 - An act is "independently wrongful," for purposes of the tort of intentional interference with prospective economic advantage, if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393; *San Jose Construction, Inc. v. S.B.C.C., Inc.*, *supra*, 155 Cal.App.4th at 1545; see also *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937.)
- The elements of *negligent* interference with prospective economic advantage are: (i) the existence of an economic relationship between the plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (ii) the defendant's knowledge of the relationship; (iii) the defendant's knowledge (actual or construed) that the relationship would be disrupted if the defendant

failed to act with reasonable care; (iv) the defendant's failure to act with reasonable care; (v) actual disruption of the relationship; and (vi) economic harm proximately caused by the defendant's negligence. (*Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1005.)

Remedies

- Compensatory (money) damages are available for interference that deprives a plaintiff of nons-speculative, future economic benefits that are reasonably likely to occur. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134.) This includes lost profits. (*Sole Energy v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 233.)
- Emotional distress damages are only available for "extreme and outrageous" conduct if it is objectively reasonable that serious emotional distress will result from the interference. (*Di Loreto v. Shumake* (1995) 38 Cal.App.4th 35.)
- Under ordinary tort principles, equitable relief may be available if the interference is ongoing.
- Punitive damages may be awarded where plaintiff proves by clear and convincing evidence that defendant is guilty of oppression, fraud, or malice. (Civ. Code, § 3294(a); *Ramona Manor Convalescent Hospital v. Care Enterprises* (1986) 177 Cal.App.3d 1120, 1141.)

Applicable Statute of Limitations

- For intentional interference (tort) the statute of limitations is two years. (Code Civ. Proc., § 339(1).) The claim begins accruing when the interference starts.

Application

- If Client can demonstrate that: (i) there were prospective buyers interested in the Property who were willing to purchase the Property for a value greater than what Vega paid for the Property; (ii) Vega knew of this economic relationship (he certainly did, as her broker); (iii) Vega intentionally concealed and/or misrepresented material facts in this regard to disrupt the relationship between Client and any prospective buyers; (iv) actual disruption of the relationship (which occurred, as Vega ended up purchasing the Property himself); and (v) damages to Client (see analysis re Client's damages above), Vega will be liable for interference with prospective business advantage.

Conclusion

- Given the evidence at the Firm's disposal, Client has a viable claim for interference with prospective business advantage.

9. STRATEGIC CONSIDERATIONS

9.1. Jurisdiction

9.1.1. Personal Jurisdiction

Because the issues related to the current dispute involve Client's property, which is located in Kings County, California, and because the parties are residents of California, the superior court in Kings County may exercise personal jurisdiction over the parties.

9.1.2. Subject Matter Jurisdiction

Subject matter jurisdiction is a requirement for suits filed in federal court. There are no federal court issues of subject matter jurisdiction in connection with this dispute.

9.2. Standing

Based upon the information/evidence that Client has provided thus far, Client has standing to pursue every cause of action described above against each of the intended defendants (excluding DOES, of course).

9.3. Pre-Filing Requirements

Mediation is required for any disputes arising from the Purchase Agreement. In addition, arbitration is required for any disputes arising from the Listing Agreement (see provisions in both documents above).

9.4. Attorneys' Fees and Costs

If this dispute is adjudicated, the prevailing party will be entitled to attorneys' fees and costs under Civil Code § 5975(c) and section 22 of the Purchase Agreement, provided that the case is first mediated (See Purchase Agreement, section 30(A).)

If new information comes to light that affects Client's right to attorneys' fees and costs, Client will be notified.

10.
FINAL
THOUGHTS/ISSUES/CONCERNS/COMMENTS

If Client opts to pursue litigation against Vega, Dale Holzboog will be a necessary party to the lawsuit. Accordingly, the Firm should confer with Client in this regard.