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COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

FILED
SEP 27 2013
COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT
BY _____ Deputy

DIANA McMENAMY et al.,	C070642
Plaintiffs and Appellants,	(Super. Ct. No. 77829)
v.	
COLONIAL FIRST LENDING GROUP, INC., et al.,	
Defendants and Respondents.	

Defendants Colonial First Lending Group, Inc., (Colonial) et al. challenge the personal jurisdiction of the California courts over an action by plaintiffs Diana McMenamy et al. for fraud, breach of fiduciary duty, negligent misrepresentation, breach of contract, and violation of California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.) arising out of the purchase of their home in Grass Valley, California.

Plaintiffs sued defendants Colonial and its loan officer Devin Jones alleging that defendants repeatedly misrepresented that plaintiffs' monthly loan payments, inclusive of principal, interest, property taxes, and insurance "would be very close to a maximum

it was not licensed to do business in a particular state, it referred the loans to Flagship Financial Group (Flagship).

Jones, a lifelong resident of Utah, is a loan officer. At all relevant times he worked as an independent contractor for Colonial originating residential mortgage loans. During his tenure with Colonial, Jones referred approximately 10 to 20 loans to Heather Hodge, the loan processor at Flagship. He would personally deliver a paper copy of the file to Hodge and say, "This person needs a loan." Typically the referrals from Colonial were complete loan files. At her deposition, Hodge testified that if she needed additional information, she talked to Colonial's Vice President Adam Erikson or someone else at Colonial "because they were the originator of the loan." She "would never talk to the borrower."[1]

When loans were referred to Flagship by Colonial, Flagship paid Colonial First Business Development, LLC, a separate entity managed by the owners of Colonial and owned by their wives, "50 percent plus or minus 25 percent" of "the loan brokerage fee or loan origination fee" paid to Flagship at closing. Colonial First Business Development, LLC, in turn, paid to Jones approximately 65 percent of the fee received from Flagship, and the owners of Colonial First Business Development, LLC (i.e., the wives of the owners of Colonial), retained the rest.

In June 2008 plaintiffs moved from Idaho to California after plaintiff Michael McMenamy got a job in Grass Valley. Prior thereto, in May 2008, Jones cold called plaintiffs after receiving a lead through one of Colonial's lead systems. Jones initially spoke to plaintiff Diana McMenamy who told him she and her husband were looking to refinance their Idaho residence to get cash out so that they could purchase a home in

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[1] Hodge later testified somewhat inconsistently that she believed Flagship was the originator of the loan because "the loan funded through Flagship," and that Flagship was the mortgage broker on loans referred to it by Colonial.

On July 24, 2008, two days after the Idaho refinancing closed, Russell sent an email to Jones, inquiring: "We are trying to . . . schedule signing off buyer and seller and wondering when you expect to send loan docs to Placer Title in Grass Valley."

On July 27, 2008, Russell sent an email to the escrow officer at Placer Title, advising: "I received a call from Devin Jones . . . and he anticipates [the] loan docs will be here by Wednesday[, July 30, 2008]. I was wondering what your availability was for signing off the [plaintiffs]."

On July 31, 2008, Jones sent an email to Russell, stating:

"Our file is in line for docs to be drawn today, so they should be to the title company this afternoon.

"I spoke with [the escrow officer] regarding the $1,000 [security deposit paid on the California property] and they will disburse that money back to Michael at closing.[3]

"I will be leaving town this afternoon and will be back Monday. If you have any questions you may try to contact me on my cell phone . . . .

"You may also speak to my processor Heather Hodge . . . ."

On August 7, 2008, escrow for the California property closed. The buyer's closing statement for the California property identifies Flagship as the loan originator, loan processor, and mortgage broker.[4]

Plaintiffs sued Colonial and Jones in Nevada County Superior Court for fraud, breach of fiduciary duty, negligent misrepresentation, breach of contract, and violation of California's unfair competition law arising out of plaintiffs' purchase of their California home. Each of these causes of action is based on the allegation defendants

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[3] Plaintiffs rented the California property for approximately one month before escrow closed, thus, it can be inferred the security deposit was paid in connection therewith.

[4] Jones denied he or Colonial participated in originating or closing the California loan. According to Jones, all such work was handled by Flagship.

DISCUSSION

" 'California courts may exercise personal jurisdiction on any basis consistent with the Constitution of California and the United States. (Code Civ. Proc., § 410.10.) The exercise of jurisdiction over a nonresident defendant comports with these Constitutions "if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate ' "traditional notions of fair play and substantial justice." ' " [Citations.]

" 'The concept of minimum contacts . . . requires states to observe certain territorial limits on their sovereignty. It "ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." ' [Citations.] To do so, the minimum contacts test asks 'whether the "quality and nature" of the defendant's activity is such that it is "reasonable" and "fair" to require him to conduct his defense in that State.' [Citations.] The test 'is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present.' [Citation.]

"Under the minimum contacts test, '[p]ersonal jurisdiction may be either general or specific.' [Citation.]" (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1061-1062 (*Snowney*).) Because plaintiffs do not claim general jurisdiction, we consider only whether specific jurisdiction exists here.

" 'When determining whether specific jurisdiction exists, courts consider the " 'relationship[s] among the defendant, the forum, and the litigation.' " ' " (*Snowney, supra,* 35 Cal.4th at p. 1062.) A court may exercise specific jurisdiction over a nonresident defendant only if: (1) the defendant has purposefully availed himself or herself of forum benefits; (2) the controversy is related to or arises out of the defendant's

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was held on February 24, 2012. Prior thereto, the trial court issued a tentative ruling that was identical to the tentative ruling issued by the court in October 2011. Following the hearing, the trial court adopted the tentative ruling as its ruling.

engaged in significant activities within' the forum [citation], or 'has created "continuing obligations" between [itself] and residents of the forum' [citation]. By limiting the scope of a forum's jurisdiction in this manner, the ' "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts . . . .' [Citation.]" (*Snowney*, *supra*, 35 Cal.4th at pp. 1062-1063.)

In our view, defendants purposefully directed their activities at residents of the forum by playing an active role in assisting plaintiffs in obtaining a loan for their California home after plaintiffs moved to California. According to the evidence, Jones had numerous communications with plaintiffs while they were residing in California, as well as with plaintiffs' agents. Contrary to defendants' claim that all of these communications were necessary elements of Jones's work assisting plaintiffs with their Idaho refinance, the evidence reveals that Jones played a significant role in originating and closing the California loan. Among other things, he gathered information relevant to obtaining financing for the California home, arranged for the California home to be appraised, facilitated the preparation and delivery of loan documents, and took steps to ensure that plaintiffs received a credit at closing for the security deposit they paid when renting the California home prior to their purchase of the same. Significantly, plaintiffs introduced evidence that on July 31, 2008, Jones emailed Russell and informed her: "Our file is in line for docs to be drawn today, so they should be to the title company this afternoon." Because the Idaho refinance had closed *nine days earlier*, it would appear that Jones was facilitating the preparation of documents for the California loan. This conclusion is supported by Jones's statement in the same email that Russell could "speak to *my* processor Heather Hodge" in his absence. (Italics added.) As detailed above, Hodge was the loan processor at Flagship, and neither she nor Flagship had anything to do with the Idaho refinance. Thus, Jones's reference to Hodge makes plain that he is referring to the California loan. Jones's involvement in closing the California loan also is

mortgage broker on the loan, likewise, does not change the fact that defendants played an active role in assisting plaintiffs in obtaining financing for the California home. We are concerned with conduct, not labels, and Hodge's characterization of defendants' actions is not evidence. Moreover, that Jones initially contacted plaintiffs while they resided in Idaho and plaintiffs thereafter "reached out to [defendants] in Utah" does not preclude the exercise of jurisdiction where, as here, defendants voluntarily proceeded to assist plaintiffs, whom they knew resided in California, in obtaining financing for their California home.

Defendants' suggest "[t]he record evidence . . . demonstrates that the [plaintiffs] were fully aware that Flagship Financial originated and brokered their California loan" prior to that loan closing. In support of their assertion, defendants cite to evidence that in July *2009*, nearly a year *after* the California loan closed, plaintiffs sought to refinance their California home through Flagship, not Colonial or Jones. Assuming for the sake of argument that plaintiffs' knowledge of Flagship's involvement in the initial financing of their California home is relevant, the evidence cited by defendants demonstrates only that plaintiffs were aware of Flagship one year *after* the loan in question closed.

Having concluded plaintiffs met their initial burden of introducing sufficient evidence defendants purposefully availed themselves of the benefits of doing business in California, we next consider whether " 'there is a substantial nexus or connection between the defendant[s'] forum activities and the plaintiff[s'] claim.' " (*Snowney, supra,* 35 Cal.4th at pp. 1067-1068.) Defendants' forum activities consisted of assisting plaintiffs in obtaining a loan for the California property, and plaintiffs claim that in the course of rendering that assistance, defendants repeatedly misrepresented the amount of the monthly payment plaintiffs would be required to pay under the loan. Because plaintiffs' claims arise out of defendants' forum activities, the exercise of specific jurisdiction is appropriate. (*Id.* at p. 1068.)

DISPOSITION

The order dismissing the complaint for lack for personal jurisdiction is reversed. Plaintiffs shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

BLEASE, Acting P. J.

We concur:

HULL, J.

MAURO, J.