Not Reported in Cal.Rptr.3d, 2008 WL 4712607 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2008 WL 4712607 (Cal.App. 2 Dist.))

Court of Appeal, Second District, Division 5, California.
LYMAN GARDENS APARTMENTS, LLC, et al., Plaintiffs and Respondents,
v.
COUDERT BROTHERS LLP, et al., Defendants and Appellants.

No. B192909.
(Los Angeles County Super. Ct. No. BC299990).
Oct. 28, 2008.

APPEAL from a judgment of the Superior Court of Los Angeles County.
Rolf M. Treu, Judge. Reversed with instructions.
Lewis Brisbois Bisgaard & Smith, Lawrence Halperin, Kenneth D. Watnick; Law Offices of Daniel J. **Koes** and Daniel J. **Koes** for Defendant and Appellant Coudert Brothers.

Moskowitz, Brestoff, Winston & Blinderman and Dennis A. Winston for Defendant and Appellant Ralph Navarro.

Rus, Miliband & Smith, Ronald Rus, Randall A. Smith and M. Peter Crinella for Plaintiffs and Respondents.

ARMSTRONG, J.

***1** Ralph Navarro and his law firm, Coudert Brothers (together referred to as "Coudert") appeal the judgment entered following a jury verdict in favor of Darryl Wong and Lyman Garden Apartments, LLC (together referred to as the "Sellers") in the latters' action for legal malpractice, breach of fiduciary duty and fraudulent concealment. Coudert maintains that there is no substantial evidence in the record to support the jury's finding of causation. We agree.

FACTS AND PROCEDURAL SUMMARY

Respondent Darryl Wong, an experienced real estate investor, negotiated the sale of the family-owned Lyman Gardens Apartments (the "Apartments" or the "Property") to a partnership controlled by two individuals, Messrs. Scapa and Silverman (the "Buyers") in 2001 and early 2002. Mr. Wong retained his long-time attorney, Ralph Navarro of Coudert Brothers, to document the sale. Although Mr. Navarro had represented Mr. Wong and his family in approximately 30 real estate transactions in the previous 15 years, he had never advised a client in the sale of residential real property.

Mr. Wong knew that the Property, a nine building, 144 unit apartment complex, contained lead-based paint, as he had received two notices from the Los Angeles County Department of Health and Human Services (the "Health Department") to that effect, one in 1995 and a second one in 2001. Indeed, in the summer of 2001, just months before entering into the Purchase Agreement, the Sellers had hired a painting contractor to paint all nine buildings comprising Lyman Gardens. After a single building was partially painted, the Health Department stopped the work and tested the Property for lead-based paint, concluding that the Apartments contained "very high levels of lead dust" that "well exceeded the regulatory level...." The Health Department recommended that the Sellers retain an expert in lead paint removal and contact the Department for a "clearance re-inspection." The Sellers chose to discontinue the painting project.

After agreeing with the Buyers on the key terms of the sale, including a purchase price of $9,425,000, Mr. Wong instructed Mr. Navarro to prepare a purchase agreement (the "Purchase Agreement") which included, among other terms, an "as is" provision, as well as a provision by

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which the Sellers guaranteed that, to the best of their knowledge, the Property was free of hazardous substances. Mr. Navarro was ignorant of the provisions of the Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4852d (a)(3) (the "Federal Act"). As a consequence, the Purchase Agreement did not contain the "Federal Warning Statement" required by the Federal Act, nor did the seller comply with the other requirements of that Act.

Following the close of the transaction, the Buyers contacted Mr. Navarro and told him that they had discovered the presence of lead-based paint at the Apartments and were making a claim for damages due to the Seller's non-disclosure of a hazardous material. The Buyers indicated that they believed the Sellers should pay the full cost of remediation. Mr. Navarro assigned a first-year Coudert Brothers associate, Nancy Morgan, to draft a memorandum (the "Morgan Memo") detailing the Sellers' exposure to liability in the Buyers' threatened lawsuit. On June 21, 2002, Morgan completed the memorandum, which explained that the "as is" provision of the Purchase Agreement did not protect the Sellers from liability to the Buyers. Coudert did not release the memorandum or divulge its contents to the Sellers. Coudert advised the Sellers to settle with the Buyers, but Mr. Wong refused, believing he had good defenses to any potential suit.

***2** On August 1, 2002, the Buyers sued the Sellers for non-disclosure of the presence of lead-based paint, alleging causes of action for breach of contract and fraud. Shortly thereafter, the Sellers sought new counsel to defend the Buyers' suit. The Sellers ultimately settled with the Buyers, paying $975,000, representing the full cost of remediation. In defending the suit, the Sellers incurred legal fees in the sum of $85,618.

The week following that settlement, the Sellers filed suit against Mr. Navarro and Coudert Brothers, seeking to recover the cost of the settlement and the attorney's fees incurred. That complaint, as amended, alleged that "Had Defendants-prior to the close of escrow-properly researched the laws relating to disclosures required of a seller upon selling an apartment building, had they advised Plaintiffs (sellers in the underlying transaction) of the laws pertaining to lead-based paint, had they advised Plaintiffs of the disclosure obligations, and had they included in the purchase and sale agreement the requisite lead-based paint warning language, all necessary disclosures would have been made, and the buyers in the underlying case would have had no cause of action against Plaintiffs. By failing to do so, Defendants negligently breached their duty to exercise reasonable care and skill in performing the agreed upon legal services." The complaint also alleged causes of action for breach of fiduciary duty and fraudulent concealment based on Coudert's failure to advise the Sellers of Coudert's negligence in preparing the Purchase Agreement and failure to disclose to the Sellers the Morgan Memo or its conclusions. In addition to compensatory damages incurred in connection with the Buyers' lawsuit, the Sellers sought punitive damages against both Mr. Navarro and Coudert Brothers based on their acts and omission in "covering up" their own negligence.

The jury rendered a special verdict, finding that both Mr. Navarro and Coudert Brothers had committed legal malpractice, breached their fiduciary duty, and committed fraudulent concealment. The jury awarded the Sellers $1,060,000 in compensatory damages. Additionally, the jury found both Mr. Navarro and Coudert Brothers guilty of oppression, fraud or malice, and awarded punitive damages against the law firm in the amount of $1.5 million.

Coudert appeals the judgment. The principal contention on appeal is that there is no substantial evidence to support the jury's finding that Coudert's conduct caused the Sellers' damages. Additionally, Coudert challenges certain rulings of the trial court, including the exclusion of evidence regarding the financial pressures weighing on the Sellers to quickly sell the Property, the exclusion of evidence, and corresponding jury instructions, regarding the

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Sellers' comparative negligence and unclean hands, and the $1.5 million award of punitive damages against Coudert Brothers, a defunct law firm.

DISCUSSION

Sellers argued to the jury that their failure to comply with the requirements of the Federal Act regarding disclosure of lead-based paint, which failure was wholly attributable to Coudert's negligence, resulted in their $975,000 payment to the Buyers to settle their lawsuit. Our Supreme Court has held that proof of these facts alone will not support a damage award in a transactional malpractice case.

***3** Both the Sellers and Coudert rely on *Viner v. Sweet* (2003) 30 Cal.4th 1232, in which the Supreme Court addressed the issue of causation and damages in a transactional malpractice case. Said the court: "[T]he crucial causation inquiry is *what would have happened* if the defendant attorney had not been negligent." (*Id.* at p. 1242.) To prove causation, a plaintiff may present evidence that, without defendant's negligence, it would have obtained a more advantageous agreement, or "better deal." [FN1] (*Id.* at p. 1240, fn. 4.) The "better deal" scenario is merely a method of proving causation; it is not the test for determining whether causation has been established. (*Ibid.*) "[T]he plaintiff need only introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. [Citation.]" (*Id.* at p. 1243, internal quotations omitted.) "An express concession by the other parties to the negotiation that they would have accepted other or additional terms is not necessary." (*Id.* at pp. 1242-1243.)

> FN1. Alternatively, a plaintiff may proceed on a theory that it would have been better off economically if, with the advice of competent counsel, no deal at all had been reached. (*Viner v. Sweet, supra,* at p. 1239.) The Sellers did not present evidence of a "no deal" scenario, and thus we do not address this hypothetical.

As *Viner* instructs, in order to recover damages for Coudert's malpractice, the Sellers had to prove that they would have been better off *but for* the malpractice. In order to do so, they were required to establish what *would have happened* had Coudert advised Sellers of the requirements of the Federal Act, and Sellers had complied with those requirements.

In order to compare what did happen (with Coudert's negligence) with what would have happened (had Coudert not been negligent), we look first at what actually took place. It is undisputed that the Sellers netted $8,364,382 from the sale of the Apartments, consisting of the $9,425,000 purchase price, less the $975,000 payment made to the Buyers in settlement of their lawsuit, less $85,618 in attorney fees paid to defend the Buyer's lawsuit.

Having established what actually happened, it was the Sellers' burden to prove what would have happened had the required disclosures been made. And for that, we look to the requirements of the Federal Act. That Act requires that, before the purchaser is obligated under a contract for the sale for "targeted" residential real property, the seller must (1) provide the purchaser with a pamphlet, as prescribed by the Environmental Protection Agency, regarding the hazards of lead-based paint and (2) "disclose to the purchaser ... the presence of any known lead-based paint, or any known lead-based paint hazards, in such housing and provide to the purchaser ... any lead hazard evaluation report available to the seller...." (42 U.S.C. § 4852d(a).) The purchaser must also be afforded a 10-day period in which "to conduct a risk assessment or inspection for the presence of lead-based paint hazards" (*ibid.*) and the contract of sale must include the following "Lead Warning Statement": "Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning

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. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase." (42 U.S.C. § 4852d (a)(3).)

***4** Thus, if Coudert had not been negligent, it would have known of the requirements of the Federal Act; inquired of Sellers about the presence of lead-based paint at the Apartments; and advised the Sellers to comply with the requirements of the Federal Act; that is, provide the Buyers with the EPA-prescribed lead hazards pamphlet; provide the Buyers with the 1995 and 2001 notices from the Health Department concerning the presence of lead-based paint and the need to remediate the hazard; afford the Buyers a 10-day period in which to inspect the Property for lead-based paint hazards and/or conduct a risk assessment of such hazards; and include in the Purchase Agreement the "Lead Warning Statement."

Given this "no negligence" scenario, it was the Sellers' burden to establish the economic effect these disclosures would have had on the purchase and sale transaction. The Sellers maintained that lead-based paint disclosures would not have affected the price at which the Buyers were willing to purchase the Property or, put another way, that the value of the Property was $9,425,000 with or without lead-based paint.

One way the Sellers could conceivably prove that Buyers would have paid exactly the same price for the Property regardless of any disclosures concerning lead-based paint would be to present the Buyers' testimony to that effect. The Sellers did not rely on this method of proof, for the simple reason that the Buyers testified that prior to the close of escrow, they did not know that the Property contained lead-based paint and that, had they known, they would not have purchased the Property without determining the cost of remediation and reducing the purchase price to reflect that cost.

A second method of proving that the disclosures would have had no effect on the purchase price would be to introduce expert evidence to that effect. For instance, the Sellers could, in theory, have presented evidence that a different prospective purchaser was willing to pay $9,425,000 or more for the Apartments even knowing of the existence of lead-based paint. Alternatively, an expert in residential real estate investments could have testified that the presence or absence of lead-based paint does not affect the value of such assets. The Sellers presented no expert evidence on the issue.

Instead, the Sellers relied on the Buyers' admitted knowledge of the prevalence of lead-based paint in old buildings such as the Apartments, and on the Health Department notices which Mr. Wong testified might have been among the documents contained in the boxes of materials provided to the Buyers during the escrow period, to argue that the Buyers would have purchased the Property for $9,450,000 whether or not the Sellers complied with the Federal Act. From this evidence, the Sellers argue that "the jury had any number of reasonable bases to conclude that the conduct of the Appellants was a cause in fact of Respondents' damages." The Sellers then cite two alternative "reasonable conclusions" which the jury may have reached to support the finding that the Buyers "would have completed the purchase for the same price whether the required disclosures were contained in the sales agreement:" (1) "the Buyers were provided with the 1995 and 2001 notices and nonetheless closed the transaction for $9.425 million with actual knowledge that those notices were in the files;" and/or (2) "the Buyers were fully aware of the risks of lead paint at the Apartments due to the age of the Apartments...." Neither con-

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clusion provides substantial evidence for the judgment.

***5** The Buyers testified that they had no knowledge of the 1995 and 2001 Health Department notices concerning lead-based paint at the Apartments. The only evidence which the Sellers offered on this issue was Mr. Wong's testimony: "I believe it [the 2001 Health Department notice] was in the file sent to them." In response to the question, "Other than your belief, do you know for a fact that it was [turned over to the Buyers prior to the close of escrow]?" Mr. Wong stated: "I don't know. [¶] I made everything available to them. They got it. If it was in there, I'm-I'm at a loss as to the question right now." This evidence does not support a finding that the Buyers had actual knowledge of the presence of lead-based paint at the Apartments.[FN2] In order to find that the Buyers had such knowledge, the jury would have to infer two facts from the evidence that the Sellers may or may not have included the Health Department notices in the files provided to the Buyers prior to the close of escrow: First, that the files *did* contain those notices, and second, that the Buyers found and read those specific notices from among all the papers contained in the boxes of files. Neither of these necessary facts is grounded in any evidence presented at trial; they are both based on pure conjecture. "The notice may have been in the box, therefore it was in the box; the notice was in the box, therefore the Buyers read it." These conclusions are simply not a product of logic, but are the result of speculation. " 'While substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding.' " (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1144.)

> FN2. The fact that the Sellers purported to have "disclosed" this matter to Buyers by giving them access to files which may have contained the 2001 Health Department notice, without, at a minimum, telling them that the pertinent notice was in those files, is evidence of concealment of a material fact.

The Sellers also argue that "The jury may reasonably have concluded that the Buyers (who were experienced apartment owners and investors) were fully aware of the risk of lead paint at the Apartments due to the age of the Apartments, and would have completed the purchase for the same price whether the required disclosures were contained in the sales agreement or not." This is, of course, a circular argument: If the Buyers would have paid the same price with or without the disclosures, then the absence of the disclosures (which is attributable to Coudert's negligence) caused no damages. In any event, what Buyers complained about, and sued Sellers over, was not the failure to disclose the *likelihood* of lead-based paint in the Apartments, but the failure to disclose the *actual presence* of lead-based paint, together with the fact that the Sellers had been unable to complete the repainting of the apartment complex just months before the closing without remediating the lead-based paint. That is to say, it was Sellers' duty to *actually notify* the Buyers about the recent involvement of the Health Department; Sellers' reliance on constructive notice or Buyers' knowledge of the "likelihood" of lead-based paint simply does not satisfy the requirements of the Federal Act. Sellers proffered no evidence of any kind that, had they *actually* put Buyers on notice of the lead-based paint problems which they had encountered in the past, the Buyers would have purchased the Apartments for $9,425,000.

***6** In short, *Viner v. Sweet* makes clear that plaintiffs were not required to prove causation via the Buyers' testimony; they were nevertheless required to prove causation. Consistent with their theory at trial they could have presented expert testimony of a real estate investor or appraiser that the actual existence of lead-based paint does not affect the value of residential rental property. They did not.[FN3] In the absence of such evidence, plaintiffs

may not rely on the bald argument, directly contradicted by the Buyers' testimony at trial, that they would have sold the Property for $9,425,000 whether or not the purchaser knew of the actual existence of lead-based paint.

> FN3. The Sellers produced two experts to testify regarding Coudert's negligence; neither of them presented testimony on the issue of causation. An additional expert, designated to testify about the valuation of apartments, never testified.

The Sellers relied on the same evidence to support a finding of breach of fiduciary duty and fraudulent concealment as that used to make out their legal malpractice case. And again, while there is substantial evidence to support the jury's finding that Coudert breached their duties to the Sellers, there is no substantial evidence for the conclusion that Coudert thereby caused the Sellers damage.

The Sellers argue one additional basis for recovery under the causes of action for breach of fiduciary duty and fraudulent concealment: That Coudert's actions in concealing the conclusions of the Morgan Memo [that the Sellers' failure to disclose the existence of lead-based paint exposed the Sellers to liability under state law for fraudulent concealment and under federal law for violation of the Federal Act] caused the Sellers to forego settlement with the Buyers for a lesser amount than the $975,000 which they ultimately agreed to. However, there is no evidence that Buyers would have settled for any amount less than $975,000. Contrary to the Sellers' contention, Coudert's argument to the jury that plaintiff could have settled with the Buyers for less than $300,000 prior to the initiation of the Buyers' lawsuit if only they had followed Coudert's advice is not evidence that the Buyers would have settled for under $300,000, or for any other amount.

In sum, there is no substantial evidence in the record to support the jury's conclusion that Coudert's conduct caused the Sellers damages. Consequently, we need not address Coudert's additional assignments of error.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with instructions to enter judgment notwithstanding the verdict in favor of Mr. Navarro and Coudert Brothers. Appellants are to recover their costs on appeal.

We concur: TURNER, P.J., and KRIEGLER, J.

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