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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

RESIDENTIAL MORTGAGE CAPITAL,

Plaintiff and Appellant,

A125695

v.

CHICAGO TITLE INSURANCE COMPANY,

**(San Francisco City & County
Super. Ct. No. 466366)**

Defendant and Respondent.

Residential Mortgage Capital (Residential Mortgage) filed a complaint against Chicago Title Insurance Company (Chicago Title) claiming Chicago Title had breached its duties when acting as the escrow agent for a residential refinance transaction. The case was tried to a judge who ruled Chicago Title had not breached any of its duties. Residential Mortgage now appeals claiming the trial court erred as a matter of law. We disagree and will affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2005, Kevin and Theresa Kuhlow wanted to refinance the mortgage on their home in San Carlos. The Kuhlows had refinanced their mortgage “a couple” of times previously and they contacted the loan broker who had handled those prior refinances, Robert DiNapoli of ICG Mortgage Consulting Group (ICG). DiNapoli, in turn, secured a refinance loan from Residential Mortgage.

An escrow for the transaction was opened at Chicago Title's Union Street office in San Francisco. Residential Mortgage placed several documents into the escrow including a promissory note, a deed of trust, and a notice of the right to cancel. As is relevant here, Residential Mortgage's escrow instructions told Chicago Title to give the Kuhlows a single copy of the notice of the right to cancel.

The Kuhlows did not come to San Francisco to sign the loan documents. Instead, their loan broker, DiNapoli, withdrew the loan documents from the escrow and took them to Kuhlow's home. There DiNapoli and Rose Wright, a notary with whom DiNapoli worked, had the Kuhlows sign and date the loan documentation. For reasons that have been left unexplained, DiNapoli and Wright instructed the Kuhlows to incorrectly date the documents August 19, 2005, rather than the correct date August 23, 2005.

About a year later in July 2006, the Kuhlows, through counsel demanded that Residential Mortgage rescind the loan transaction. They claimed that because the loan documents had been misdated, they had lost their right to cancel the loan transaction. The Kuhlows also claimed they had not been provided with the correct number of copies of the right to cancel that is required by federal law.

Residential Mortgage believed the Kuhlows' arguments were well founded. Accordingly it elected to rescind the loan transaction and to reimburse the Kuhlows the finance charges they had paid plus attorney fees.

Residential Mortgage then filed the complaint that is at issue in the current appeal. Naming DiNapoli, ICG, Wright, and Chicago Title as defendants, Residential Mortgage sought to recover the amounts it had paid to the Kuhlows under the "third party tort" doctrine.

DiNapoli, ICG, and Wright failed to answer the complaint and Residential Mortgage obtained default judgments against them. Thus, the case proceeded to a court trial solely against Chicago Title under breach of fiduciary duty and negligence causes of action.

After a four-day trial, the court ruled in favor of Chicago Title ruling it had not breached any duty that it owed to Residential Mortgage. The court explaining its decision as follows:

“While the escrow instructions plainly required the borrowers to sign and date the closing instructions, none of the language prohibited the loan documents from being removed from Chicago Title’s offices. Both the experts for Plaintiff and Defendant testified that it was within the standard of care to permit instructions to be removed from the escrow company offices by persons associated with the transaction. Furthermore, the testimony at trial establishes that all of the lender’s instructions found in the Specific Closing Instructions (Exhibit E) and per the Addendum to Closing Instructions (Exhibit F) were executed.

“Chicago Title never sought to delegate its responsibilities to Mr. DiNapoli. Instead, at the request of the Kuhlows’ loan broker, Mr. DiNapoli, Chicago Title released the escrow documents. At the time that Mr. DiNapoli removed the documents from Chicago Title’s office, he was acting as an agent for the Kuhlows and on his own behalf. Mr. DiNapoli was serving the Kuhlows’ convenience by taking the documents to their home for signature which avoided the complication and delay of arranging a time to sign the documents at Chicago Title’s office, nearly twenty miles away. This worked to expedite the close of escrow which in turn benefitted Mr. DiNapoli by accelerating the payment of his commission. By permitting this to be done, Chicago Title did not delegate its authority to Mr. DiNapoli or his notary public, Ms. Wright, to act as its sub-agents. He was an agent for the Kuhlows, not Chicago Title. No evidence was introduced establishing any delegation of responsibility or authority by Chicago Title to Mr. DiNapoli. Furthermore, Chicago Title had no knowledge that the loan documents had been misdated when Mr. DiNapoli returned them. Plaintiff’s expert testified that there were insufficient facts to put Chicago Title on notice that there had been wrongful misdating of the documents. Moreover, the Plaintiff’s expert also testified there was no reason for Chicago Title to be suspicious of Mr. DiNapoli. Accordingly, Plaintiff has failed to show any breach of fiduciary duty or negligence on the part of Chicago Title.”

The court also ruled Chicago Title could not be held responsible for providing the Kuhlows with an incorrect number of copies of the notice of the right to cancel because Chicago had simply followed Residential Mortgage's escrow instructions on that point.

After the court entered a judgment in favor of Chicago Title, Residential Mortgage filed the present appeal.

II. DISCUSSION

Residential Mortgage contends the trial court erred when it ruled Chicago Title did not breach any of its duties.

Chicago Title performed escrow services for the Kuhlows' mortgage refinance transaction, and as appellant acknowledges, the trial court properly found that Chicago Title "acted as a dual agent for both the borrowers and lender." An "escrow holder, as a dual agent of the parties to the escrow, owes duties to the parties to the escrow. However, those duties are limited. The primary duty owed by an escrow holder is to strictly and faithfully perform the instructions given to it by the parties to the escrow." (*Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 674.)

Here, the escrow instructions told Chicago Title to perform various acts and the trial court ruled all of those acts had been performed. Indeed, Residential Mortgage does not claim otherwise. Since the evidence supports the trial court's conclusion that Chicago Title executed all of the lender's instructions and did not breach any instruction it was given, it did not breach any duty that it owed to Residential Mortgage.

Residential Mortgage contends that the trial court erred because "DiNapoli and Wright were [Chicago Title's] agents as a matter of law . . ." According to Residential Mortgage, "[Chicago Title's] affirmative act of giving the unsigned loan/escrow documents to DiNapoli/Wright, for the express purpose of delivery to and execution by the Kuhlows, can lead to no other inference but that Chicago was asking DiNapoli and Wright to do so." We disagree.

"An agent is one who represents another . . . in dealings with third persons." (Civ. Code, § 2295.) No particular words are necessary to create an agency. (*Malloy v. Fong* (1951) 37 Cal.2d 356, 372.) "All that is required is conduct by each party manifesting

acceptance of a relationship whereby one of them is to perform work for the other under the latter's direction.” (*Ibid.*) Whether an agency relationship exists is a question of fact for the trier of fact, whose ruling will be upheld if it is supported by substantial evidence. (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies, Corp.* (2007) 148 Cal.App.4th 937, 965.)

Here, the trial court expressly ruled that DiNapoli and Wright were not Chicago Title's agents and that ruling is amply supported by the evidence. While the record indicates Chicago Title released the loan documents to DiNapoli so he could obtain the Kuhlows' signatures, there is no evidence that Chicago Title *asked* DiNapoli to perform that task. The court found DiNapoli removed the documents at the request of the borrower's broker. Indeed, there is no evidence that Chicago Title was obligated by the escrow instructions to obtain the Kuhlows' signatures on the loan documents. Absent evidence that indicates Chicago Title delegated to DiNapoli and Wright some task that it was obligated to perform, there is no basis to conclude that DiNapoli and Wright were acting as Chicago Title's agent.

Residential Mortgage contends the trial court's finding that “[n]o evidence[] was introduced establishing any delegation of responsibility or authority by Chicago Title to Mr. DiNapoli” is undermined by Civil Code section 2349 which states an agent may “delegate his powers to another person” “[w]hen it is the usage of the place to delegate such powers” Residential Mortgage relies on evidence at trial that indicated that when the Kuhlows' refinanced their mortgage, it was common for escrow agents to release loan documents so they could be signed elsewhere. While it may have been common for an escrow agent to release loan documents so they could be signed elsewhere, that fact does not somehow create an obligation on the part of an escrow agent to perform some task that does not otherwise exist. Civil Code section 2349 is not implicated here.

We conclude the trial court correctly ruled that Chicago Title had not breached any duty that it owed to Residential Mortgage.

III. DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.