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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHOUMIN ZHANG, an individual, Plaintiff-Appellant, v. AMERICAN FRANCHISE REGIONAL CENTER, LLC, a California limited liability company; et al., Defendants-Appellees, AMERICANA ONE, LLC, Intervenor-Defendant-Appellee.	No. 17-55641 D.C. No. 2:15-cv-09583-PJW MEMORANDUM*

SHOUMIN ZHANG, an individual, Plaintiff-Appellee, v. AMERICAN FRANCHISE REGIONAL CENTER, LLC, a California limited liability company; et al.,	No. 17-55730 D.C. No. 2:15-cv-09583-PJW

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendants,

and

AMERICANA ONE, LLC,

Intervenor-Defendant-Appellant.

SHOUMIN ZHANG, an individual,

Plaintiff-Appellant,

v.

JOHN DEYONG HU, an individual and HU & ASSOCIATES, LLC, a California limited liability company,

Defendants-Appellees.

No. 17-56577

D.C. No. 2:15-cv-09583-PJW

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Submitted February 4, 2019[**]
Pasadena, California

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: WARDLAW and BEA, Circuit Judges, and DRAIN,[***] District Judge.

This case concerns Plaintiff-Appellant Shoumin Zhang's agreement to invest $500,000 in the Tustin Project lead by Americana One, LLC in exchange for its support of Zhang's I-526 petition to the United States Citizenship and Immigration Services ("USCIS") to obtain permanent residency through the EB-5 Visa Program. As the parties are familiar with the details of this case, we do not restate them here.

We have jurisdiction under 28 U.S.C. § 1291, and we apply California law to this diversity action. We **AFFIRM** in part and **REVERSE** in part.

1. We review de novo the district court's grant of summary judgment to Americana One, LLC ("Americana One"). *Velarde v. PACE Membership Warehouse, Inc.*, 105 F.3d 1313, 1317 (9th Cir. 1997).

Summary judgment is proper in a breach of contract dispute where there is no genuine issue of material fact as to whether (1) a contract exists; (2) the party alleging breach of contract performed or is excused for nonperformance; (3) the other party breached the contract; and (4) the moving party suffered damages as a result of the other party's breach. *Beck Park Apartments v. U.S. Dep't of Hous. & Urban Dev.*,

[***] The Honorable Gershwin A. Drain, United States District Judge for the Eastern District of Michigan, sitting by designation.

695 F.2d 366, 368 (9th Cir. 1982); *Oasis West Realty, LLC v. Goldman*, 250 P.3d 1115, 1121 (Cal. 2011).

The district court properly granted Americana One summary judgment on its breach of contract claim. First, neither party disputes that the Subscription Agreement is a valid contract. Second, Americana One performed by providing Zhang with necessary documentation for her I-526 petition. Third, Zhang breached the Subscription Agreement because she withdrew her I-526 petition, despite the fact that the agreement states her subscription was irrevocable. Finally, Americana One suffered damages because it lost the use of Zhang's $500,000 investment as a result.

2. We review de novo the district court's selection of the proper legal standard for measuring damages, *Gayle Manufacturing Co. v. Federal Savings & Loan Insurance Corp.*, 910 F.2d 574, 578 (9th Cir. 1990), and we conclude that the district court erred in awarding Americana One $250,000 in damages under a prejudgment interest theory.[1]

First, the district court incorrectly interpreted section 2(e) of the Subscription Agreement, which the parties agree is a liquidated damages clause. Under California law, contracts must be interpreted "as to give effect to the mutual intention of the

[1] We need not separately address Zhang's breach of contract claim against Americana One alleging that it failed to adhere to the liquidated damages clause because we necessarily resolve that issue here.

parties as it existed at the time of contracting," Cal. Civ. Code § 1636, "ascertained from the writing alone, if possible," *id.* § 1639. Additionally, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." *Id.* § 1641.

In relevant part, section 2(e) of the Subscription Agreement states:

> [I]f the I-526 application is *denied by the USCIS* . . . and such said denial[is] due to Subscriber's . . . *abandonment of or refusal to file* [an] application by the Subscriber, the Company shall return the Purchase Price within 60 calendar days but the Company shall charge fifty thousand U.S. Dollars by directly deduct[ing] from the investment amount and [pay it] to AFRC as reimbursement or compensation for the work done by AFRC.

The district court interpreted "denied by the USCIS" to mean an action by the USCIS amounting to an *official* denial. When read in isolation, that interpretation makes sense. But when read in context with the rest of the sentence, "denied by the USCIS" cannot mean an action by the USCIS amounting to an "official denial" because the contract specifically contemplates that a denial by the USCIS may be due to "abandonment of" or "refusal to file [an] application by the Subscriber." If a subscriber abandons or refuses to file an I-526 petition, the USCIS would never act to provide an official denial because there would be no I-526 petition to deny. Thus, "denial by the USCIS" in section 2(e) logically must mean "not granted by the USCIS," even if the reason it was not granted was that the petition was withdrawn or

abandoned by the petitioner.

Zhang's I-526 petition was not granted by the USCIS because she withdrew her petition from the USCIS. Thus, Zhang's withdrawal falls within the conduct contemplated by section 2(e).

Second, the district court erred by not applying the liquidated damages clause. Under California law, "parties to a contract may use a liquidated damages clause to determine the measure of damages in advance." *Allen v. Smith*, 114 Cal. Rptr. 2d 898, 903 (Ct. App. 2002). "[A] provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." Cal. Civ. Code § 1671(b). Neither party argues that the liquidated damages clause is invalid or unreasonable. Thus, the district court should have applied the liquidated damages clause to award Americana One $50,000 in damages.

3. We also reverse the district court's denial of attorney fees to Americana One under section 5 of the Subscription Agreement. Under California law, we review "de novo a determination of an award of attorney fees under a contractual provision where, as here, no extrinsic evidence has been offered to interpret the contract, and the facts are not in dispute." *Kangarlou v. Progressive Title Co.*, 27 Cal. Rptr. 3d 754,

755 (Ct. App. 2005).

Relevant here, if possible, "the court should give effect to every provision" in the contract. *City of El Cajon v. El Cajon Police Officers' Ass'n*, 56 Cal. Rptr. 2d 723, 727 (Ct. App. 1996) (citation omitted). "An interpretation which renders part of the instrument to be surplusage should be avoided." *Id.*; *see also* Cal. Civ. Code § 1652 ("Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."). Further, "where a general and a particular provision of a written instrument are inconsistent, the particular controls the general . . . ." *MacDonald & Kruse, Inc. v. San Jose Steel Co.*, 105 Cal. Rptr. 725, 730 (Ct. App. 1972).

On cross-appeal, Americana One argues that it is entitled to attorneys' fees under section 5 of the Subscription Agreement because Zhang breached the contract. Section 5 states:

> The Subscriber agrees *to indemnify and hold harmless the Company* . . . from and against all losses, liabilities, claims, damages, costs, fees and expenses whatsoever (including, but not limited to, any and all expenses incurred in investigating, preparing or defending against any litigation commenced or threatened) *based upon or arising out of* . . . *[a] breach by the Subscriber* of any covenant or agreement made by the Subscriber in this Agreement . . . .

The district court disagreed with Americana One's argument. It held that section 5 of the Subscription Agreement directly conflicts with section 17(c), which states, under the title "Miscellaneous":

> Each of the parties to this Agreement *shall pay its own fees and expenses* (including the fees of any attorneys, accountants, appraisers or others engaged by such party) *in connection with this Agreement* and the transactions contemplated by this Agreement, whether or not the transactions contemplated by this Agreement are consummated.

The district court concluded that because these two provisions directly conflict, and because "contract ambiguities are construed against the drafter, the agreement shall be construed to provide that each party bears [its] own costs of litigation."

While there is some conflict between the two provisions, we construe ambiguities against the drafter only if the ambiguity cannot be removed through other rules of contract interpretation. Cal. Civ. Code § 1654. Here, section 5 specifically states that the subscriber must pay Americana One's attorneys' fees incurred in the event she breaches the contract, while section 17(c) addresses general attorneys' fees that may arise in connection with the Subscription Agreement. Because section 5 is more particular than section 17(c), it controls. Additionally, to give effect to both provisions, we interpret section 5 as an exception to section 17(c) in cases where the subscriber breaches the agreement. Thus, because Zhang breached the Subscription Agreement, Zhang owes Americana One attorneys' fees pursuant to section 5.

4. The district court did not abuse its discretion by denying Zhang leave to amend her fraud claim. "We review the denial of leave to amend for an abuse of discretion, but we review the question of futility of amendment de novo." *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1172 (9th Cir. 2016) (internal citations omitted).

The first element required to plead a fraud claim successfully is a misrepresentation. *Lazar v. Superior Court*, 909 P.2d 981, 984 (Cal. 1996). But here, Zhang has not alleged any misrepresentation by the defendants; rather, her allegations are based on her own misunderstanding of the written marketing materials.

Zhang argues that the defendants misrepresented that the Tustin Project property "costs" $8,281,000 even though Americana One paid only $2,300,000 to purchase it. Substituting $2,300,000 for $8,281,000 in the total project costs calculation, Zhang argues that the EB-5 investors' shares amount to approximately 80% of the total project costs instead of 52% as the defendants represented. Zhang further argues that had she known this, she would not have invested in the Tustin Project, and as a result, she suffered damages of $500,000.

But the marketing materials never state that the property was *purchased* for $8,281,000. Rather, they state that the *value* of the property is $8,281,000 based on an attached appraisal that states the estimated sale price if sold within 30 days. That

figure is then used to represent the "total project costs" to show investors the value of their contributions versus the value of Americana One's contribution. Thus, the defendants did not misrepresent the "cost" to Americana One of the Tustin Project property. Because Zhang does not allege an actual misrepresentation, amendment would be futile.

5. The district court did not err in granting Hu and Hu & Associates (collectively, "Hu") summary judgment on Zhang's breach of fiduciary duty and fraudulent concealment claims.

As to Zhang's fraudulent concealment claim, she offered no evidence that Hu intentionally concealed or suppressed information with the intent to defraud Zhang—a necessary element of that claim. *See Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1163 (9th Cir. 2012) (applying California law). As to Zhang's breach of fiduciary duty claim, she offered no evidence to support her allegations that Hu simultaneously represented Americana One and her, or that she suffered damages by not seeing the EB-5 Immigration Service Agreement. In fact, prior to entering the Subscription Agreement, Hu sent Zhang an email apprising her of his dealings with Americana One. Hence, Zhang would have already been aware of any materials contained within the EB-5 Immigration Service Agreement. Zhang also offered no evidence that Hu placed a lien on her funds in escrow, and even if he had, Zhang did not argue or

explain how placing such a lien on her funds was a breach of Hu's fiduciary duty of loyalty. Thus, the district court properly granted Hu's motion for summary judgment.

We therefore **AFFIRM** in part, **REVERSE** in part, and **REMAND** to the district court with instructions to award Americana One $50,000 in liquidated damages and to determine the amount of attorneys' fees to which Americana One is entitled for Zhang's breach. Each party shall bear its own costs on appeal.