Filed 5/20/04; pub. order 6/14/03 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PHILIP LE FRANCOIS et al., Plaintiffs and Appellants, v. PRABHU GOEL et al., Defendants and Respondents.	H025213 (Santa Clara County Super. Ct. No. CV787632)

Plaintiffs, Philip Le Francois and Eric Herald sued their former employer, Duet Technologies, Inc. (Duet)[1] and three Duet officers, claiming that Duet had wrongfully withheld sales commissions and that the officers had made certain injurious misrepresentations and false promises.

About a year after the litigation commenced, all defendants moved for summary judgment or in the alternative summary adjudication. The trial court denied the motion. A year after that, the individual defendants, Prabhu Goel, Anil Gupta, and Mark Goldman, filed a similar motion (the second motion) and a different trial court judge granted summary judgment as to them.

On appeal, plaintiffs argue that the second motion was an improper renewal of the first motion, that the trial court's determination of the merits of the second motion was

[1] The named corporate defendants were Duet Technologies, Inc., Duet Corporation, and Policyone, Inc.

erroneous; and that the trial court abused its discretion in denying plaintiffs' motion to reconsider the unfavorable ruling. We shall affirm.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND

Duet's business involved the sale of certain technology products for which Motorola was a potential customer. Since both plaintiffs had close relationships with Motorola, they were desirable additions to the Duet sales team and Duet hired them in mid-1998.

In October 1998, after plaintiffs had been employed by Duet for several months, Gupta asked for their advice on developing a transaction with Motorola involving certain Duet software. A few months later, Gupta began asking plaintiffs about Motorola's operations and organizational structure. Goldman assured plaintiffs that Gupta's inquiries would not infringe their sales activities. Plaintiffs advised Gupta and others at Duet about developing a relationship with Motorola.

On April 1, 1999, nine months to a year after plaintiffs were first hired, Duet gave them "exclusive rights to all commissions on Motorola sales transactions between Duet and Motorola." According to plaintiffs, this grant applied to any Motorola transaction, regardless of who had negotiated the deal. Plaintiffs claimed that this promise was "a material component" of their compensation and employment agreement with Duet. Plaintiffs worked on the Motorola account and Motorola submitted at least one purchase order for a transaction that plaintiffs negotiated.

On April 26, 1999, Gupta instructed Le Francois to stop all communication with Motorola. Within days, Gupta announced a $10.1 million deal with Motorola that involved a sale of Duet assets and incorporated certain Duet technology, the sale or lease of which plaintiffs had been negotiating with Motorola. Plaintiffs argued that Duet owed

[2] Plaintiffs have abandoned the appeal as to Goldman so that the appeal now applies only to Goel and Gupta.

them a commission on the $10.1 million transaction. Duet refused to pay the full amount. Plaintiffs' employment was terminated in July 1999.

Plaintiffs' First Amended Complaint alleged causes of action for conspiracy, false promise, intentional misrepresentation, and negligent misrepresentation as against the three individual defendants. All defendants moved for summary judgment or in the alternative summary adjudication, arguing, among other things, that plaintiffs could not prove the elements of the fraud claims.

On May 23, 2001, the Honorable William J. Elfving denied the motion, ruling that plaintiffs had raised a triable issue of material fact as to the existence of the alleged misrepresentations. Judge Elfving's ruling did not address the other elements of the fraud causes of action. Defendants did not request reconsideration of the ruling.

Over a year later, the individual defendants filed the second motion in which they again argued that plaintiffs could not prove the elements of the fraud causes of action. Plaintiffs opposed the motion, submitting substantially the same opposition they submitted to the first motion. Additionally, plaintiffs objected that the motion was an improper request for reconsideration and impermissible under Code of Civil Procedure section 437c, subdivision (f)(2) (section 437c (f)(2)).[3]

The second motion was set to be heard before Judge Elfving but for unknown reasons it was transferred to the Honorable Robert A. Baines for hearing. Neither side objected to the transfer. Judge Baines granted the motion for summary adjudication of the three misrepresentation causes of action, finding that plaintiffs had failed to raise a triable issue of fact with respect to the element of reliance. Judge Baines also granted summary adjudication of the conspiracy cause of action since the only bases for it were

[3] Hereafter, all undesignated statutory references are to the Code of Civil Procedure.

the fraud causes of action. Judge Baines did not rule or comment upon plaintiffs' objection that the motion was an improper renewal of a prior motion.

Plaintiffs then filed a motion for reconsideration of Judge Baines's ruling. Plaintiffs purported to include new evidence contained in new declarations of their own and facts obtained from the deposition of a Duet human resources officer. Judge Baines denied the motion and entered judgment for the three individual defendants. This appeal followed.

II. ISSUES

1. Must the judgment be reversed because Judge Baines overturned the ruling of a different trial court judge?

2. Was Judge Baines empowered to rule upon the second motion absent new facts or new law?

3. Was the court correct in concluding there was no triable issue of fact as to the individual defendants Goel and Gupta?

4. Was it an abuse of discretion for Judge Baines to refuse to consider plaintiffs' new evidence submitted with their motion for reconsideration?

III. DISCUSSION

A. Plaintiffs Waived Objection to Having Judge Baines Hear the Second Motion

Plaintiffs argue that Judge Baines's ruling was an improper reversal of a ruling made by a different superior court judge. Defendants contend that plaintiffs waived the point by failing to object below. We agree with defendants.

The general rule is that appellate courts will not consider issues for the first time on appeal. This rule applies to matters involving the rights and interests of litigants that could have been cured in the trial court. (*Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 5.) It is also the rule that one trial court judge may not reconsider and overrule another judge in the same court. Only if the first judge is

unavailable may a second judge reconsider a prior interim ruling. (*Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1232.)

Assuming the second motion was a renewal of the first, a timely objection might have elicited information to show that Judge Elfving was unavailable or encouraged Judge Baines to defer to the first judge. That is, the problem, if there was one, was remediable below. Therefore, we decline to consider it for the first time on appeal.

B. The Trial Court Had Inherent Power to Rule on the Second Motion

Plaintiffs' next contention is that the trial court's ruling on the second motion is invalid as a violation of sections 1008 and 437c (f)(2).

Section 1008, subdivision (a) allows a party to seek reconsideration of an order only if the reconsideration request is based on "new or different facts, circumstances, or law." Section 437c (f)(2) states: "a party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court, unless that party establishes to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion." Thus, under either section 1008 or section 437c (f)(2), a party may not seek reconsideration of a prior ruling absent newly discovered facts, changed circumstances, or a change in the law.

Our review of the two motions reveals that the second motion was based upon the same law and the same evidence contained in the first motion. Accordingly, the second motion violated the terms of both section 1008 and 437c (f)(2). The only question then is whether, in light of that violation, the trial court retained the power to rule upon the motion.

As to section 1008, our court recently answered the question in the affirmative. (*Scott Co. v. United States Fidelity & Guaranty Ins. Co*. (2003) 107 Cal.App.4th 197, 205 (*Scott*).) *Scott* held that to the extent section 1008, subdivision (e) purported to deprive the court of power to correct a prior interim ruling, it conflicted with article VI, section 1,

of the California Constitution, which confers the judicial power on the courts.[4] As such, it is "an impermissible interference with the core functions of the judiciary." (*Scott*, *supra*, 107 Cal.App.4th at p. 210.) "To deprive a court of jurisdiction to reconsider its interim rulings would, in our view, create a significant impediment to a court's ability to reach a fair and expeditious resolution of the issues before it." (*Ibid.*) *Scott* concluded that section 1008, subdivision (e) must be reformed to eliminate any restriction upon the court's jurisdiction with regard to applications for reconsideration and renewals of previous motions. (*Scott*, *supra*, 107 Cal.App.4th at p. 211.) It follows that under *Scott*, Judge Baines had inherent power to rule upon the second motion even if it was not based upon new facts or law.

The analysis of section 437c (f)(2) is no different. We disagree with *Bagley v. TRW*, *Inc.* (1999) 73 Cal.App.4th 1092, 1096-1097, upon which plaintiffs rely in this case. *Bagley* held that section 437c (f)(2) prohibited the trial court from considering a second summary judgment motion that was factually and analytically identical to a prior motion. *Bagley* rejected the appellant's contention that the court had inherent power to reconsider its prior ruling, stating that a trial court "does not have the inherent power to act in a manner that is prohibited by statute." (*Bagley v. TRW*, *Inc.*, *supra*, 73 Cal.App.4th at p. 1097, fn. 5.) To the extent this statement suggests that a statute may deprive the court of its inherent power, it directly conflicts with our reasoning in *Scott.* The courts' inherent power does not depend on statute, nor may a statute confine it. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 267.)

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[4] Subdivision (e) of section 1008 provides that the statute "specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section."

In any event, nothing in section 437c (f)(2) expressly deprives a trial court of jurisdiction to hear a second summary judgment motion that does not comply with its requirements. Thus, while section 437c (f)(2) authorizes a trial court to reject a renewed motion for summary judgment if the party fails to show new facts or law, it does not render the court powerless to rule on the motion if it chooses to do so.

We conclude that notwithstanding either section 1008 or section 437c (f)(2), Judge Baines had inherent power to exercise his "constitutionally derived authority to reconsider the prior interim ruling and correct an error of law on a dispositive issue." (*Scott*, *supra*, 107 Cal.App.4th at p. 212.)

C. There Was No Triable Issue of Fact as to Defendants Goel and Gupta

Having concluded that Judge Baines had inherent power to rule on the second motion, we turn now to its merits.

Any party may move for summary judgment in an action if it is contended that the action has no merit. (§ 437c, subd. (a).) A defendant seeking summary judgment bears the initial burden of proving the cause of action has no merit by showing that one or more of its elements cannot be established or there is a complete defense to it. (§ 437c, subds. (a), (o)(2); *Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 213.) On an appeal from summary judgment we review the record de novo. (*Guz v. Bechtel National*, *Inc.* (2000) 24 Cal.4th 317, 334.) We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1001.) "In undertaking our independent review of the evidence submitted, we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue. [Citation.]" (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

In pleading the fraud claims, plaintiffs alleged that they relied upon defendants' promises and representations when they conferred with Gupta, Goldman, and others about the Motorola accounts and when they conducted sales negotiations with Motorola. Plaintiffs' allegation of damage was stated only in the vaguest of terms, i.e., that they "suffered damage, and will continue to be damaged, in an amount in excess of the jurisdictional limit . . . ."

Defendants' second motion argued that plaintiffs could not prove the elements of their fraud causes of action. " 'The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) To maintain any fraud action, a plaintiff must show that he or she changed position in reliance upon the alleged fraud *and* was damaged by that change of position. (Civ. Code, § 1709.) For example, in *Lazar*, evidence that the plaintiff had quit his job and moved across the country in reliance upon the defendant's misrepresentations, would have been sufficient to demonstrate a detrimental change of position. (*Lazar v. Superior Court*, *supra*, 12 Cal.4th at p. 639.)

Defendants submitted plaintiffs' own declarations-the declarations plaintiffs had used in opposing the first summary judgment motion-in support of their contention that plaintiffs could not prove the requisite detrimental reliance. Both declarations more or less repeated the allegations of the First Amended Complaint, i.e., that plaintiffs went to work for Duet in 1998, they were promised in 1999 that they would receive commissions on any transaction with Motorola, that they relied on this promise in conferring with Gupta and others at Duet, and that they were not paid what they believed they were owed out of the $10.1 million deal that Gupta negotiated. The declarations did not include any facts to show a detrimental change of position since plaintiffs admitted that they were already employed by Duet and were doing the jobs they had been hired to perform when

the alleged misrepresentations were made. This was enough to justify judgment in favor of defendants and shift the burden to plaintiffs to demonstrate the existence of a triable issue of fact.

In opposition, plaintiffs submitted evidence to support their allegations about the alleged exclusivity agreement, the assurances that Gupta would not infringe their sales transactions, and the commissions they claimed were owed. They continued to assert that they conferred with the officers of the company and developed a relationship with Motorola in reliance upon the alleged misrepresentations. But this was not sufficient to support their claims because, as the trial court found, they suffered no damage as a result, i.e., they did only what they had been hired to do in the first place. Thus, plaintiffs failed to demonstrate a triable issue of fact with respect to detrimental reliance, which is fatal to each of the three misrepresentation causes of action. Since these causes of action were the only ones upon which the conspiracy cause of action could have been based, the trial court did not err in granting summary judgment for the individual defendants.

D. The Trial Court Had Discretion to Refuse to Consider Plaintiffs' New Evidence Submitted with Their Motion for Reconsideration

After the trial court granted defendants' second motion, plaintiffs filed a motion for reconsideration in which they presented additional evidence that they claimed had bearing upon the question of detrimental reliance. Plaintiffs produced the deposition of Duet's Director of Human Resources, Juanita Newman in which Ms. Newman declared that between March and November 1999 Duet was laying off a number of workers and closing down departments. Ms. Newman testified that Duet gave financial bonuses to encourage certain engineering employees to stay on and finish projects they had been working on but she was unaware of any bonuses or incentives offered to employees in the sales department. Plaintiffs submitted new declarations of their own in which they explained their understanding that Duet had given Motorola to them as their exclusive territory as an incentive to stay with the company and that as a result, they refrained from

seeking other employment. Both declared that they stayed with Duet only because of defendants' representations concerning the Motorola account. Le Francois declared that he had other job offers that he would have accepted had it not been for the representations. Herald did not claim to have had any other offers, but declared simply that he "refrained from pursuing other employment" because of the promises that were made to him.

In their motion for reconsideration, plaintiffs argued that they had new evidence within the meaning of section 1008 and, in any event, the court had inherent power to reconsider its ruling. The court denied the motion, concluding that plaintiffs had not met the requirements of section 1008 because they made no showing of why the evidence could not have been presented earlier. The court also pointed out that plaintiffs' most recent declarations, in which they claimed to have passed up other employment opportunities, were not consistent with their pleadings. The First Amended Complaint alleged only that plaintiffs had relied upon the alleged misrepresentations by conferring with the defendants and conducting sales negotiations with Motorola. The trial court held that since the pleadings define the issues in a summary judgment motion, plaintiffs could not belatedly revise their claims in an effort to avoid the court's ruling.

On appeal, plaintiffs all but concede that the evidence in their reconsideration motion was not "new." Their primary argument is that the trial court should have considered their motion simply because the court had the inherent power to do so. They also argue that they were justified in not offering the evidence in the first instance because defendants had not included the absence of reliance as an undisputed fact in their separate statement. We are not persuaded.

Under section 1008, subdivision (a), a motion for reconsideration may only be made "based upon new or different facts, circumstances, or law . . . ." "[T]he party seeking reconsideration [must] provide both newly discovered evidence and an explanation for the failure to have produced such evidence earlier. [Citation.]" (*Robbins*

v. Los Angeles Unified School Dist. (1992) 3 Cal.App.4th 313, 317.) Evidence is not considered "new," if it was available to a party before the prior hearing. (*Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1005, 1013 disapproved on another ground in *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1605-1608.)

The only thing new in plaintiffs' motion for reconsideration is their contention that they remained employed by Duet during the 1999 period only because of defendants' representations about the Motorola account. This evidence was available to plaintiffs all along and could have been made in connection with defendants' motion. Furthermore, the trial court was correct in noting that the evidence is not relevant to the issues defined by the pleadings.

Although the trial court had inherent power to reconsider its ruling, the question of whether or not to exercise that power is one that is purely within the trial court's discretion. (*Robbins v. Los Angeles Unified School Dist.*, *supra*, 3 Cal.App.4th at p. 317.) We can see no abuse of discretion here, particularly when plaintiffs failed to make the claim or produce the evidence during the course of litigating two dispositive motions.

Finally, defendants' failure to list the element of reliance in the separate statement of facts is immaterial. The very basis of the motion was that there were no facts to support that element.[5] Plaintiffs had ample notice that they needed to demonstrate a triable issue on the point.

In short, the trial court did not abuse its discretion in denying the motion for reconsideration.

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[5] Defendants' summary judgment motion was, in effect, a motion for judgment on the pleadings. (See *Stolz v. Wong Communications Limited Partnership* (1994) 25 Cal.App.4th 1811, 1817.)

IV. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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THE COURT:

The opinion which was filed on May 20, 2004, is certified for publication.

_____
Premo, J.

_____
Rushing, P.J.

_____
Elia, J.

The written opinion which was filed on May 20, 2004, has now been certified for publication pursuant to rule 976(b) of the California Rules of Court, and it is therefore ordered that the opinion be published in the official reports.

_____
Rushing, P.J.

Trial Court:	Santa Clara County Superior Court Superior Court No. CV787632
Trial Judge:	Hon. Robert A. Baines
Attorneys for Plaintiffs/Appellants: Philip LeFrancois Eric Herald	Robinson & Wood Jon B. Zimmerman Helen E. Williams
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