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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

WILLIAM J. CAMPBELL et al.,

Petitioners,

v.

SUPERIOR COURT OF THE CITY AND
COUNTY OF SAN FRANCISCO,

Respondent;

VISHAL GROVER et al.,

Real Parties in Interest.

A144153

(San Francisco City & County
Super. Ct. No. CGC13533428)

**OPINION AND ORDER FOR
PEREMPTORY WRIT OF MANDATE**

By The Court:¹

In this original mandamus proceeding, petitioners William and Marjorie Campbell (defendants and cross-complainants in the underlying suit) seek a writ compelling respondent superior court to vacate its order approving a partial settlement agreement between plaintiff and other defendants in the underlying suit and dismissing their cross-complaint in its entirety under Code of Civil Procedure section 877.6. In accordance with *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177–180, we issued notice that we might conclude issuance of a peremptory writ in the first instance would be appropriate. (Code Civ. Proc., § 1088; *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35;

¹ Before Humes, P.J., Margulies, J., and Banke, J.

Lewis v. Superior Court (1999) 19 Cal.4th 1232, 1239–1241.)² We so conclude and order issuance of a writ directing respondent court to vacate its order approving the partial settlement and dismissing the Campbell’s cross-complaint.

In the underlying suit, real party in interest Vishal Grover filed a complaint for damages for breach of warranty, intentional and negligent misrepresentation, breach of fiduciary duty, negligence and unfair business practices, against the Campbells, NRT West, Inc., doing business as Coldwell Banker Residential Real Estate (Coldwell Banker), and David B. Bellings. The complaint arose from Grover’s purchase of a house from the Campbells. The complaint alleges, inter alia, that the Campbells and Bellings, a broker with Coldwell Banker, misrepresented the structural condition of the property and thus greatly underestimated the cost of the improvements Grover intended to make upon purchasing the property.

The Campbells, in turn, filed a cross-complaint against Bellings and Coldwell Banker for breach of fiduciary duty, negligence, negligent misrepresentation, fraud, and implied equitable or comparative indemnity. The Campbells allege: They entered into an exclusive listing agreement with Coldwell Banker in March 2010 to list their home for sale at \$12.8 million, with a 5 percent commission. In May 2011, Bellings met Grover and his wife Monaz, and learned they were looking for a home in the price range of the Campbells’ property and wished to make two major improvements if they purchased the property. Thereafter, Bellings, acting as an agent of the Grovers, actively solicited their purchase of the property by misrepresenting the structural condition of the house and the cost of the anticipated improvements. In January 2012, the Campbells received a \$10.9 million offer for the property. Bellings knew about this offer, and the following day presented an offer from the Grovers for \$11 million.

In January 2015, Grover reached a tentative settlement with Coldwell Banker and Bellings and filed a Code of Civil Procedure section 877.6 motion for a good faith settlement determination and dismissal of the Campbell’s cross-complaint. Respondent

² All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

court granted the motion, finding the settlement satisfied the factors set forth in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488. It dismissed the cross-complaint in its entirety on the ground the cross-claims were derivative of those brought by Grover.

When an “injured party settles with one of the parties alleged to have caused its damages and the settlement is confirmed to be in good faith ‘other joint tortfeasors . . . are barred from bringing equitable indemnity or contribution actions against the settling tortfeasor.’ ” (*Gackstetter v. Frawley* (2006) 135 Cal.App.4th 1257, 1271 (*Gackstetter*)). The bar applies to claims for total as well as partial equitable indemnity, and including “claims not labeled as indemnity claims, but that in reality are ‘disguised’ indemnity claims. [Citation.]” (*Ibid.*)

But “[a] claim by a joint tortfeasor seeking neither indemnity nor contribution survives a good faith settlement under section 877.6. . . . The words ‘indemnity’ or ‘contribution’ need not be used. It is the substance of the claim that is determinative.” (*Gackstetter, supra*, 135 Cal.App.4th at p. 1274.) Also, “a good faith settlement does not bar a claim that the trial court would not contemplate in determining the proportionate liability of a settling tortfeasor.” (*Ibid.*; see *Cal-Jones Properties v. Evans Pacific Corp.* (1989) 216 Cal.App.3d 324, 328 (*Cal-Jones*) [“A claim by a joint tortfeasor seeking neither indemnity nor contribution and which the trial court would not contemplate in determining the proportionate ability of a settling tortfeasor is not a claim for indemnity and hence survives a good faith settlement under section 877.6.”].)

The Campbells acknowledge their sixth cause of action, for “Implied, Equitable or Comparative Indemnity,” would be barred by the operation of section 877.6. However, they assert their remaining causes of action against Bellings and Coldwell Banker seek relief for their *own* injuries flowing from Bellings’ dual representation and concealment thereof, including his manipulation of the transaction (to favor sale to the Grovers, rather than the other potential purchaser, who had no plans to make structural changes/improvements to the property) in pursuit of a double commission. As direct

damages, the Campbells seek return of the commission paid to Bellings and Coldwell Banker (\$450,000), as well as their costs in defending against Grover's suit.

The Campbells thus contend their causes of action for breach of fiduciary duty, negligence, negligent misrepresentation, fraud and constructive fraud are not disguised derivative claims, but are based on breaches of duty owed directly to them. We agree. (See *William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1315 [cross-complaint alleging causes of action for negligence, breach of fiduciary duty, and breach of contract against party in its capacity as the *sellers' broker* did not arise under the buyer-broker agreement or from the duties owed as the buyers' broker to buyers; rather the cross-claims arose out of the duties owed to the sellers as clients in their own right and thus were not derivative of claims by buyers]; cf. *Cal-Jones, supra*, 216 Cal.App.3d at p. 329 [indicating cross-claim for return of commission would not be derivative if sellers had sought punitive damages, pleaded bad faith or fraud in their cross-complaint and alleged a factual basis for such a finding, all of which the Campbells have pled here].)

Accordingly, let a peremptory writ of mandate issue commanding respondent Superior Court of the City and County of San Francisco, in its case No. CGC13533428, to vacate its "Order Granting Plaintiff Vishal Grover's Motion to Determine That Partial Settlement With Defendants NRT West, Inc. and David D. Bellings is in Good Faith," filed on January 14, 2015. Thereafter, and if necessary and appropriate, respondent may enter a new and different order consistent with the views expressed in this opinion. Petitioner is entitled to costs incurred in these writ proceedings. (See Cal. Rules of Court, rule 8.493(a)(1).) Our decision is final in this court immediately. (Cal. Rules of Court, rule 8.490(b)(2)(A).)