

Case No. B210502

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

Marvin Hur and Connie Hur,
Plaintiffs and Respondents,

v.

Byoung Woo Lee,
Defendant and Appellant.

Los Angeles Superior Court, Case No. BC 352132 (Related Case No. BC 361921)
Honorable John P. Shook

APPELLANT LEE'S PETITION FOR REHEARING

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Appellant Byoung Woo Lee hereby petitions for a rehearing from the decision of the Court, filed on September 9, 2009, for the following reasons:

INTRODUCTION

A Court of Appeal has authority to grant a rehearing pursuant to CRC 8.268. A petition for rehearing must be served and filed within 15 days after the filing of the decision. *Ibid.* A rehearing may be granted on the ground that the Court's opinion reflects a mistake of law or misunderstanding of facts. *In re Jessup's Estate* (1889) 81 C. 408, 471-472:

“If we are satisfied from the petition [for rehearing] that, owing to any mistake of law or misunderstanding of facts, our decision has done an injustice in the particular case, . . . and it is seriously doubted whether we have correctly decided, we grant a rehearing.”

Appellant Lee respectfully submits that the Court's opinion (“Opinion”) reflects a mistake of law and misunderstanding of facts, as more particularly discussed below.

ARGUMENT

RESPECTFULLY, THE OPINION'S CONCLUSION THAT THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING OF THE FRAUD ELEMENT OF “JUSTIFIABLE RELIANCE” IS BASED ON A MISTAKE OF LAW AND MISUNDERSTANDING OF FACTS, BECAUSE:

A. Although the Trial Court's Statement of Decision Contains a Finding That the Hurs Relied on the False Information Given to Them by the Defendants, it Contains No Evidentiary Analysis Concerning Nor Finding That Such Reliance Was Justifiable.

Lee respectfully submits that the essential evidence negating justifiable reliance is the Hur's participation in the April 8 meeting with Watanabe, the general manager of the restaurant, in which the Hurs availed themselves of unhindered access to confer with Watanabe regarding the restaurant's operation and financial condition, and that Watanabe had no motive to be

anything but cooperative and truthful with the Hurs, who were introduced to him as Lee's partner in the purchase from Asakuma, such that the Hurs must be charged with knowledge of all facts reasonable diligence would have disclosed, as a result of which they cannot claim justifiable reliance on the misrepresentations.

The Statement of Decision ("SOD") is 21 pages long. AA 175-196. Ninety percent of its verbiage is dedicated to reciting and analyzing evidence as to the falsity of the defendants' representations about the restaurant's operations and financial condition. However, it contains only one finding on the topic of the Hurs' reliance on false representations. (AA 183):

"21. *In reliance on the false statements* of Yoon and Lee concerning the false financial statements, profitability of the Restaurants, and that the Asakuma tax returns did not truly reflect the financial performance of the Restaurants, Plaintiffs completed the purchase of Wilshire on April 21, 2006, before discovering the falsity of the Financial Statements, which discovery occurred on May 8, 2006, following Plaintiffs' request for verification of the false financial statement from Aki-san." (Emphasis provided).

The SOD contains no finding that such reliance was justifiable. Furthermore, it contains no discussion as to whether the evidence of what transpired at the April 8 meeting does or does not support the defendants' contention that the Hurs failed to establish the essential fraud element of justifiable reliance.

The Opinion (at p. 15) cites with approval the rule that, "[a] plaintiff who has access to the necessary information and actually makes an independent investigation that the defendant does not hinder will be charged with knowledge of the facts reasonable diligence would have disclosed and cannot claim reliance on the representations." It goes on to observe, however (at p. 15):

“Appellants are incorrect that the evidence concerning the April 8 meeting was conclusive proof that the Hurs failed to establish justifiable reliance. ‘Under California law, . . . whether reliance was reasonable is a *question of fact for the [trier of fact]*, and may be decided as a matter of law only *if the facts permit reasonable minds to come to just one conclusion.*’” (Emphasis added).

Although the Opinion states the rule that whether reliance was justifiable is a question of fact for the trier of fact, it does not refer to any finding of justifiable reliance in the SOD, because there is no such finding. Rather, the Opinion merely concludes that the trial court was free to conclude that the Hur’s aforesaid reliance was reasonable (Opinion, p. 17), either implying that the trial court made such a finding; or perhaps, if it had made such a finding, it would have been supported by substantial evidence.

As will be developed in detail under heading B, below, such a finding is not supported by substantial evidence because of what the evidence discloses transpired at the April 8 meeting.

B. A Fair Reading of the Record Demonstrates That Reasonable Minds Could Come to Only One Conclusion, i.e., That Prior to the Close of Escrow, the Hurs Were Given Unhindered Access to Confer With Watanabe, the General Manager of the Restaurant, Regarding the Restaurant’s Operation and Financial Condition, That They in Fact Discussed Information Regarding the Same, and That Watanabe Had No Motive to Be Anything but Cooperative and Truthful with Mr. Hur, Who Was Introduced to Him as Lee’s Partner in the Purchase from Asakuma, Such That the Hurs Must Be Charged With Knowledge of All Facts Reasonable Diligence Would Have Disclosed, and Therefore, They Cannot Claim Justifiable Reliance on the Misrepresentations.

Detailed Review of Relevant Evidence

On April 10, 2006, Lee closed his purchase of the Wilshire restaurant from Asakuma at a

price of \$550,000. Exhibit 21, AA 430. The Lee-Hur escrow for purchase of the Wilshire restaurant closed on April 21, 2006. Statement of Decision (“SOD”) ¶ 21, AA 183.

Testimony by Watanabe (March 27-28,2008):

Two days prior to the close of the Lee-Asakuma escrow, on April 8, 2006, Lee introduced Mr. and Mrs. Hur to Watanabe as Lee’s partners. RT 13:18-14:3. Two days before the aforesaid close of escrow, the managers of the restaurant and the new owners and partners had a meeting because Watanabe needed the new owners’ signature on vendors’ agreements. RT 14:10-15:3.

Prior to the close of escrow, Watanabe had conversations with the Hurs. Whether or not there were two conversations prior to the close of escrow, Watanabe was sure he had a conversation with the Hurs on April 8. RT 147:11-18.

At the April 8 meeting: Watanabe *did not* talk to the Hurs about improving profits of the Wilshire restaurant. Watanabe asked Mr. Hur to sign the vendor’s agreements. Then they talked about opening the patio and the number of years on the Wilshire location lease. RT 149:4-23.

[At that juncture, Lee’s attorney, Song, read from page 100 of Watanabe’s deposition transcript]:

Before April 22, Watanabe had met twice with the Hurs face-to-face. They never mentioned the subject financial statements during these meetings. The first time Watanabe heard about the financial statements was on May 8. *Prior to that, they had met and discussed the business of Asakuma, “pretty much discussing everything except these financial statements.” During these two meetings, “we discussed about how we make -- how we make the profits. . . . just general restaurant conversation, how we cut food costs and how we making more sales.”* (Emphasis added). RT 149:24-151:5.

With respect to how many times Watanabe had met with the Hurs prior to the close of escrow on April 21 [the close of the Lee-Hur escrow], he met with them first on April 7, at which

meeting he was introduced and they exchanged greetings. *They then met on April 8, at which time they sat down and "discussed the business about Asakuma with the Hurs."* Prior to April 21, there were no other meetings between Watanabe and the Hurs where the business operation was discussed in any fashion. Watanabe acknowledged that he understood his deposition testimony that Mr. Song had read to him, and further acknowledged that *on April 8, there were discussions about food costs and making more sales.* RT 151:19-152:3.

[Rereading to Mr. Watanabe portions of his deposition testimony, set forth above, Mr. Song got Watanabe to acknowledge at trial]: *His deposition testimony refreshed his memory that on April 8, he discussed with Marvin Hur ways to cut food costs, and ways of making more sales; and although he was not really sure, he affirmed that they also discussed what the profit of the business was in April 2006.* RT 153:12-155:4.

[Watanabe then equivocated]: He remembered discussing the Wilshire restaurant lease terms and also the patio operation, but did not really remember whether they discussed about details of how to cut food costs or how to increase the sales using other expenses. *But he acknowledged that at his deposition he remembered those details.* RT 155:18-156:1.

Testimony by Watanabe (April 17, 2008):

One of the purposes of the meeting of April 8 was to get signatures regarding vendors. The meeting lasted for about two hours. *They talked about the state of the lease at the Wilshire restaurant; and how the Wilshire restaurant was managed up to that point. They also talked about the potential investment that Marvin Hur was going to make; as well as about the costs and expenses.* RT 518:20-519:10.

[After interposition of an objection by the Hurs' attorney, Watanabe equivocated with respect to the state of his memory regarding what was discussed at the April 8 meeting]:

He remembered talking about vendors, signatures, the lease, the investment; but did not remember talking about the detailed expenses, nor about the expenses generally, nor about gross sales. RT 519:11-521:8.

Testimony by Marvin Hur (April 18, 2008):

At the April 8 meeting, Mr. Hur was aware that Watanabe was the general manager of the Wilshire restaurant. *At that meeting , he had the opportunity to ask Watanabe questions about the restaurant. Watanabe did not refuse to answer any question that Mr. Hur asked.* He did not ask Watanabe any questions about the three years of tax returns nor the financial statements that he had previously received, nor any questions about the income or expenses of the Wilshire restaurant. RT 663:24-664:21. (Emphasis supplied).

Recitation of Evidence in the Opinion

Footnote 12 of the Opinion contains an important additional detail of the discussion between Watanabe and the Hurs at the April 8 meeting:

“The statement of decision does not discuss the decrease in price. It appears from the record at some point during the negotiations, the Hurs were informed by Lee and Yoon that they would not experience any difficulty if they wished to extend the lease on the Wilshire restaurant, which had approximately nine more years to run. *However, the Hurs learned from Watanabe at an April 8 meeting that the landlord had indicated he might choose to develop the property rather than extend any of the tenants’ leases.*

[RT 16:14-17:11.] The Hurs confronted Yoon with this information and threatened to cancel the deal. Yoon told the Hurs that if they canceled, Lee would sue and they would lose their deposit. Yoon subsequently agreed to forego his commission, lowering the purchase price for the four restaurants by \$145,000.”

The key finding on the issue at hand was in ¶ 13 of the SOD:

“Yoon told Plaintiffs, and Lee later confirmed, that because the Restaurants were being flipped at an astonishingly low price (given the financial figures cited by Yoon and Lee, which were, unbeknownst to Plaintiffs, false), that Plaintiffs could not approach the seller, Mr. Kondo, the sole shareholder of Asakuma USA, Inc., or its president, Aki-san, because it would result in derailment of the Asakuma/Lee Purchase, due to Mr. Kondo learning that he had sold the Restaurants at a bargain price. Yoon and Lee also told Plaintiffs that they could not speak with the Restaurants’ employees, and the Wilshire landlord, Tony Yeh, for the same reason.

“The Court finds that the true purpose of this concealment was to prevent Plaintiffs learning of the true financial operation of the Restaurants from Aki-san, Andrew-san, or any other knowledgeable employee, and in Tony Yeh’s case, to prevent the Hurs from learning about the true status of the Wilshire lease. Namely, that the Wilshire landlord was not promising to extend any leases into beyond 2015, because the Wilshire landlord was reserving its option for high-rise development of the Wilshire location.” SOD ¶ 13, AA 175, 180. (Emphasis added).

The evidence discloses that the the Hurs had a two hour conversation with Watanabe on April 8, during which, *at a minimum* they discussed the landlord’s ambivalence in regard to extending the lease beyond 2015 [which led to a \$145,000 reduction in the purchase price]. Further, according to Watanabe, they discussed the profits, expenses, operation, and management

of the Wilshire restaurant, *“pretty much discussing everything except these financial statements.”*¹

Despite its importance in regard to the issue of justifiable reliance, the SOD contains no mention of the April 8 meeting, nor does it make any findings as to what was discussed or not discussed between Watanabe and the Hurs at that meeting.

Based upon the above significant finding in paragraph 13 of the SOD, the Opinion contains the following observation at pages 16-17:

“The evidence does not indicate that Watanabe - - whose employer, Kondo, had no dealings with the Hurs - - was given instructions to cooperate fully with Mr. Hur or to answer questions concerning confidential financial matters. Mr. Hur himself had been warned by Lee and Yoon to avoid discussing the details of the transaction with Kondo or his employees.”

Respectfully, the finding in ¶ 13 of the SOD and the above quote from the Opinion fail to take into account that Lee and Hur figured out a method of giving Hur access to Watanabe without risking disclosure to Kondo that Lee was flipping the restaurant to Hur. They simply fibbed to Watanabe, advising him that the Hurs were Lee’s partners in the purchase of the restaurant from Asakuma.

The primary premise of the finding of fraud against Lee is that Lee was well aware that the Wilshire restaurant had been unprofitable for the previous several years, and that he obtained this knowledge by disclosure from Asakuma as to the financial condition of the restaurant. Since Asakuma had made disclosure of the restaurant’s adverse financial condition to Lee, and

¹ The SOD praises the credibility of Aki-san/Watanabe as a third-party witness: “Neither Aki-san nor Andrew-san, as third-party witnesses, had any motivation to misrepresent testimony and were credible.”

Watanabe believed that the Hurs were Lee's partners, there would be no reason why Watanabe would be reluctant to cooperate with the Hurs in freely discussing the restaurant's financial condition, which had already been disclosed to the Hur's (purported) partner, Lee. Respectfully, in this context, the above observation in the Opinion that, "The evidence does not indicate that Watanabe - - *whose employer, Kondo, had no dealings with the Hurs* [emphasis added] - - was given instructions to cooperate fully with Mr. Hur or to answer questions concerning confidential financial matters," simply does not make sense. At the April 8 meeting, it is not true that Watanabe would have been under the impression that Kondo had no dealings with the Hurs, in that since Kondo had dealings with Lee, and the Hurs were introduced as Lee's partner, Watanabe would have been under the impression that Kondo did have dealings with the Hurs.

Based on this record, respectfully, reasonable minds can only come to one conclusion: That at the April 8 meeting, there was absolutely no impediment to the Hur's conferring with Watanabe about every detail of the restaurant's operation and financial condition; and as mentioned above, there would be no reason to find that Watanabe would be anything but cooperative and truthful in responding to Hur's inquiries. Indeed, any innuendo that Watanabe would not have disclosed to Hur "confidential financial matters" about the restaurant is soundly refuted by the fact that during the April 8 meeting, Watanabe disclosed to Hur the adverse information about the landlord's attitude toward extending the lease.

The overarching conclusion in reviewing the testimony of Watanabe is that during the April 8 meeting, he discussed with the Hurs information about the financial condition and operations of the Wilshire restaurant. That is the clear substance of his first round of testimony on March 27-28, and the beginning of his second round of testimony on April 17, as well as his prior testimony during his deposition, which was read into the trial record. Lee concedes that during the latter part of Watanabe's second round of testimony on April 17, he equivocated by

stating he did not remember discussing the financial matters during the April 8 meeting.

However, during his first round of testimony, although he slightly equivocated about the state of his memory, he admitted that during his deposition he remembered participating in such discussions.

Regardless of what the full extent of the discussion between Watanabe and the Hurs was on April 8, it is clear that: (1) they discussed information relating to the operation of the restaurant; (2) Mr. Hur admits that Watanabe cooperatively answered every question he asked; (3) Watanabe had no motive to be anything but cooperative and truthful with the Hurs; and (4) there was absolutely no reason why Mr. Hur could not have made as full inquiry of Watanabe as he pleased as to the operations and finances of the restaurant. Therefore, pursuant to the applicable authority quoted in Appellant Lee's Opening Brief and in the Opinion, having been given unhindered access to Watanabe, and having embarked on some level of inquiry as to the restaurant operation, the Hurs are charged with all information that reasonable diligence would have disclosed, and thus cannot claim that they justifiably relied upon the misrepresentations.

CONCLUSION

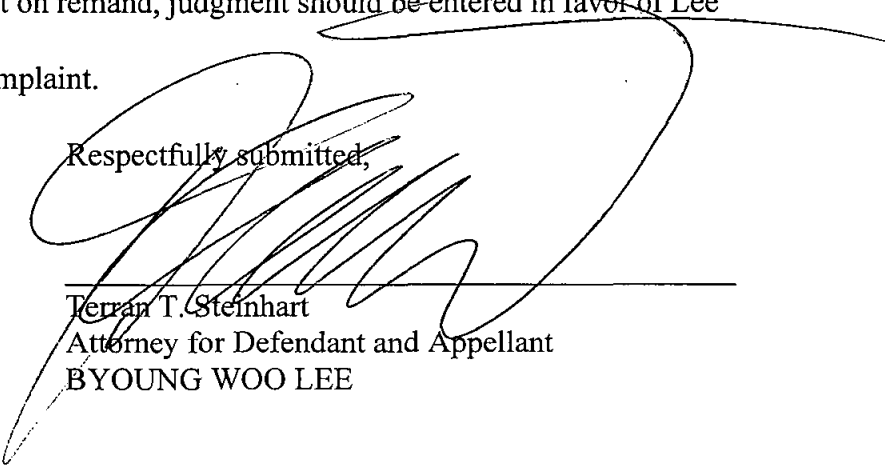
The premise of the instant Petition for Rehearing is the principle stated in *In re Jessup's Estate* (1889) 81 C. 408, 471-472:

"If we are satisfied from the petition [for rehearing] that, owing to any mistake of law or misunderstanding of facts, our decision has done an injustice in the particular case, . . . and it is seriously doubted whether we have correctly decided, we grant a rehearing."

The Opinion refutes one or more of the Lee's arguments by observing that "a fair reading" of the record discloses that Lee's arguments are incorrect. In this Petition, Lee respectfully submits that a fair reading of the evidence demonstrates that the Hurs failed to establish the essential fraud element of justifiable reliance, as a result of which the judgment

should be reversed with instructions that on remand, judgment should be entered in favor of Lee
and all other appellants on the Hur's complaint.

Respectfully submitted,

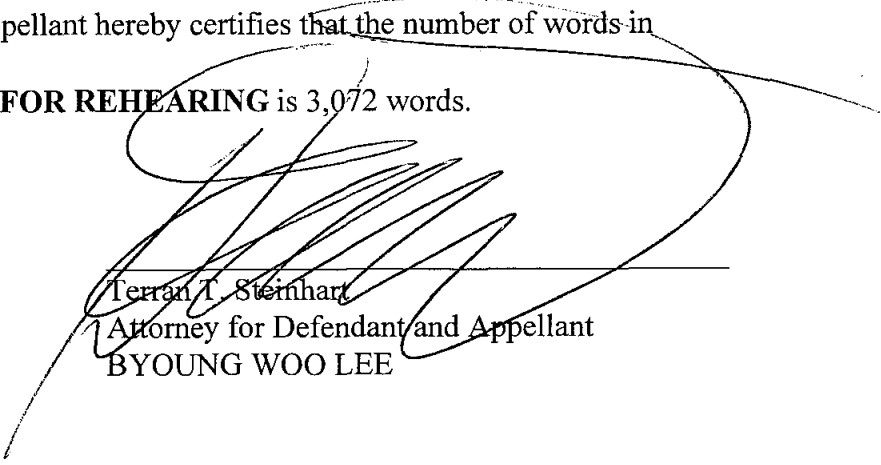


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ATTORNEY'S CERTIFICATE OF COMPLIANCE WITH CRC 14©

Counsel for petitioner and appellant hereby certifies that the number of words in
APPELLANT LEE'S PETITION FOR REHEARING is 3,072 words.

Date: September 21, 2009



Terran T. Steinhart

Attorney for Defendant and Appellant
BYOUNG WOO LEE

PROOF OF SERVICE BY MAIL

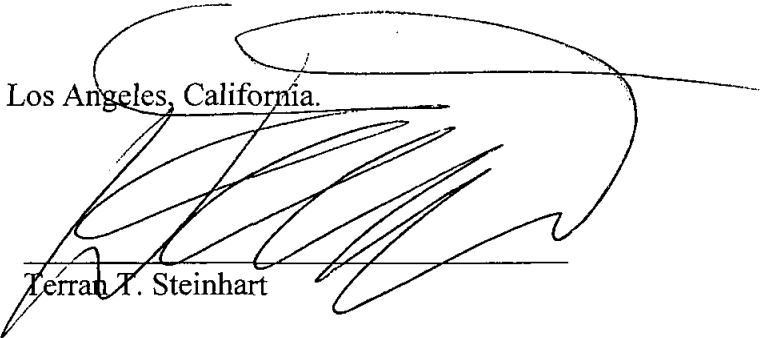
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 4311 Wilshire Boulevard, Suite 415, Los Angeles, California 90010-3713, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On the date set forth below, at the aforesaid place of business, one copy each of the document described as **APPELLANT LEE'S PETITION FOR REHEARING** was placed for deposit in the United States Postal Service in a sealed envelope, with postage fully pre-paid, addressed as set forth in the attached Service List to opposing counsel and the Superior Court judge care of the court clerk, and four copies to the California Supreme Court per said Service List; and said envelopes were placed for collection and mailing on said date following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 21, 2009 at Los Angeles, California.


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890\Appellant Lee's Petition for Rehearing