



Filed

Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

PETER S. CHUNG,
Plaintiff-Appellant,

v.

BLAIR CONSTRUCTION CO., LTD.,
Defendant-Appellee.

Supreme Court Case No. CVA18-019
Superior Court Case No. CV0447-14

OPINION

Cite as: 2019 Guam 28

Appeal from the Superior Court of Guam
Argued and submitted on February 26, 2019
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.

MARAMAN, C.J.:

[1] Following a bench trial, Plaintiff-Appellant Peter S. Chung appeals a judgment of the Superior Court, which found that Chung’s complaint for malicious prosecution failed because probable cause existed when Defendant-Appellee Blair Construction Co., Ltd. (“Blair Construction”) filed a prior lawsuit against Chung for breach of fiduciary duty, fraud, and civil conspiracy. We conclude that the Superior Court did not clearly err when it determined probable cause existed for Blair Construction’s original lawsuit, and we affirm the judgment below.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Malicious prosecution actions, like this one, involve two interrelated lawsuits. *See, e.g., Wong v. Cayetano*, 143 P.3d 1, 17-18 (Haw. 2006). First, there is the underlying action allegedly filed with malice. *See Blair Constr. Co. v. Chung*, CV1753-09 (Guam Super. Ct. filed Nov. 24, 2009). Second, there is the current suit for malicious prosecution. *See Chung v. Blair Constr. Co.*, CV0447-14 (Guam Super. Ct. filed Apr. 24, 2014).

A. The Land Transactions and Underlying Lawsuit (CV1753-09)

[3] In January 2008, Blair Construction, a South Korean company, inquired with Chung about finding a property suitable for a housing development. Chung identified Lot 7134 in Yigo, which was owned by David Lujan. Chung showed the property to Mr. Heung Koo Lee and Ms. Ja Young Yim—Blair Construction’s agents. At first, Lee did not express interest specifically in Lot 7134 or any other property.

[4] On February 1, 2008, Earth Road (Guam), Inc. (“Earth Road”), a Guam corporation, entered into a Land Purchase Agreement for Lot 7134. Earth Road intended to purchase Lot

7134 from David Lujan for \$1,650,000. Earth Road paid an initial deposit on February 1, 2008, a second deposit on March 7, 2008, and a third deposit on March 20, 2008.

[5] On March 10, 2008, Earth Road executed another Land Purchase Agreement to sell Lot 7134 to Blair Construction for \$2,450,000.

[6] Both transactions closed on the same day. The Lujan-Earth Road transaction closed first, followed by the Earth Road-Blair Construction transaction. Earth Road realized a gain of \$800,000. Chung, who was acting as a dual agent for the Earth Road-Blair Construction transaction, and his sub-agent both received commissions. Both Chung and an individual named Kwon Jung Do signed the sales agreement on behalf of Earth Road. Yim testified that she did not know of these back-to-back transactions. Chung testified that he believed he disclosed all the relevant information to Blair Construction, but also admitted that he did not tell Blair Construction the purchase price of the Lujan-Earth Road transaction.

[7] Eventually, Blair Construction acquired knowledge about the Lujan-Earth Road transaction and its financials. Blair Construction realized Earth Road had acted as a middle party. Blair Construction confronted Chung about the deal and requested a refund. Chung refused to refund the money.

[8] Blair Construction sued in the Superior Court of Guam seeking \$800,000 in damages for breach of fiduciary duty, fraud, and conspiracy. Blair Construction alleged that Chung breached his duty of loyalty by failing to disclose the Lujan-Earth Road transaction and its details. Additionally, Blair Construction believed Chung failed to adequately disclose his connection with Earth Road. Blair Construction pointed to the fact that, at least in 2007, Chung was listed as Earth Road's officer or general manager. In response, Chung testified and presented evidence he disclosed to Blair Construction his relationship to Earth Road and the nature of the

transaction. The Superior Court ultimately found for Chung. Blair Construction appealed, but we dismissed the appeal for failure to timely file a jurisdictional statement. *See Blair Constr. Co. v. Chung*, CVA13-012 (Order, July 3, 2013).

B. The Present Action for Malicious Prosecution (CV0447-14)

[9] Following the judgment in his favor, Chung filed a malicious prosecution action against Blair Construction. Chung alleged Blair Construction filed the original action without probable cause and with malice. Blair Construction responded by pointing to the annual report identifying Chung as an officer of Earth Road and to the lack of information regarding the Lujan-Earth Road transaction.

[10] During the malicious prosecution trial, Chung testified that he lied when he signed the annual report as an officer. He further testified that despite signing the annual report under oath, he was never an officer of Earth Road.

[11] After a bench trial, the Superior Court determined there was probable cause for bringing the underlying lawsuit due to the timing of the transactions—*i.e.*, closing on the same day—and the annual report listing Chung as an officer of Earth Road. Additionally, the court relied on the substantial monetary gain to Earth Road as further circumstantial evidence supporting its decision. The Superior Court declined to address the malice issue. The court entered judgment for Blair Construction. Chung timely appealed.

II. JURISDICTION

[12] This court has jurisdiction over appeals from final judgments of the Superior Court. 7 GCA §§ 3107, 3108(a) (2005); 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-90 (2019)).

III. STANDARD OF REVIEW

[13] Following a bench trial, we review probable cause determinations in malicious prosecution actions for clear error. *See Lucero v. Stewart*, D.C. Civ. No. 88-0010A, 1988 WL 242612, at *1 (D. Guam App. Div. Nov. 17, 1988); *Fargo Pac., Inc. v. Korando Corp.*, 2006 Guam 22 ¶ 21 (“Findings of fact made following a bench trial are reviewed under a clear error standard.”); *see also* Guam R. Civ. P. 52(a). “A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Fargo Pac.*, 2006 Guam 22 ¶ 22. Conclusions of law are reviewed *de novo*. *Town House Dep’t Stores, Inc. v. Ahn*, 2000 Guam 32 ¶ 13.

IV. ANALYSIS

[14] After the bench trial for malicious prosecution, the Superior Court concluded that Blair Construction had probable cause to file its underlying lawsuit against Chung. Chung alleges that the court erred in its determination and asks us to reverse the finding of probable cause. In reviewing the Superior Court’s determination, we begin by discussing the law surrounding malicious prosecution. We then review whether the Superior Court clearly erred. In conducting this analysis, we first review whether Blair Construction had an adequate legal and factual basis for its lawsuit. This requires an almost formalistic review of the causes of action pleaded and a case-specific inquiry into the facts and evidence. Second, we look to whether the Superior Court’s probable cause finding, when reviewed under the deferential clear error standard, was correct.

[15] Deferring to the Superior Court’s factual determinations, we ultimately find no clear error in its determination that probable cause existed for Blair Construction to institute the underlying

action; Blair Construction's complaint in the underlying action stated tenable causes of action founded on an adequate factual basis. We are not left with a definite and firm conviction that the Superior Court made a mistake.

A. Malicious Prosecution Claims in Guam

[16] In the most basic formulation, the common law elements of malicious prosecution are: a prior action "(1) was initiated by or at the direction of the defendant and legally terminated in the plaintiff's favor, (2) was brought without probable cause, and (3) was initiated with malice." *Siebel v. Mittlesteadt*, 161 P.3d 527, 530 (Cal. 2007); *see also Phillips v. Ceribo*, D.C. Civ. No. 83-0053A, 1984 WL 48862, at *2 (D. Guam App. Div. Apr. 16, 1984) (discussing "lack of probable cause" and "malice" as distinct elements of a malicious prosecution action). *But see* 7 Am. Jur. Proof of Facts 2d 181 § 3 (originally published in 1975) (discussing six elements). "Probable cause exists if a person filing the claim has reasonable grounds for relief under the theory of law actually asserted." *Lucero*, 1988 WL 242612, at *1. For a trier-of-fact assessing probable cause, "[t]he test is both subjective and objective." *Id.* "The test generally applied is: upon the appearances presented to the defendant, would a reasonably prudent [person] have instituted or continued the proceeding?" *McClinton v. Rice*, 265 P.2d 425, 431 (Ariz. 1953) (citing *Rickman v. Safeway Stores, Inc.*, 227 P.2d 607 (Mont. 1951); *Tucker v. Bartlett*, 155 P. 1 (Kan. 1916)).

[17] Our role as the appellate court is to determine whether the Superior Court clearly erred in finding probable cause for Blair Construction to sue Chung for breach of fiduciary duty, fraud, and civil conspiracy. This analysis requires us to:

consider both the factual circumstances established by the evidence and the legal theory upon which relief is sought. A litigant will lack probable cause for his action if he relies upon facts which he has no reasonable cause to believe to be

true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.

See Sycamore Ridge Apartments LLC v. Naumann, 69 Cal. Rptr. 3d 561, 575 (Ct. App. 2007) (quoting *Sangster v. Paetkau*, 80 Cal. Rptr. 2d 66, 74 (Ct. App. 1998)). In the underlying litigation—which Chung claims was maliciously prosecuted—Blair Construction asserted claims for breach of fiduciary duty, fraud, and conspiracy. These claims were based on allegations that, among other things, Chung failed to disclose the original list price of Lot 7134, engaged in a secret “flip transaction” of the property, utilized a corporate entity to disguise his personal interest in the transaction, and falsely represented that he could not obtain Lot 7134 for Blair Construction at a price lower than \$2.45 million.

[18] Upfront, we also must clear up a dispute over the relevant time period the Superior Court must focus on in assessing probable cause. The trial court in the underlying action concluded Chung made adequate disclosures, which at least implicitly means Blair Construction was found to have had knowledge of the transaction from the beginning. In Chung’s view of the case, this ends the inquiry regarding probable cause. Appellant’s Br. at 8-10 (Oct. 29, 2018). Chung argues that he established in the prior action and at trial in this action the facts known to Blair Construction at the time the action was filed. *Id.* However, Chung’s position relies on a post-hoc determination of the facts. Malicious prosecution actions require looking at probable cause at the time the lawsuit was filed or continued, *see, e.g., Zamos v. Stroud*, 87 P.3d 802, 811-12 (Cal. 2004), not at the ultimate findings of the court in the underlying action, *see, e.g., Fox v. Fox*, 391 P.3d 124, 126 (Okla. Civ. App. 2016) (“[T]he analysis focuses on the reasonableness of [the defendant’s ‘honest belief’ in the merits of the suit], based on the facts known to the defendant at the time of filing.”). The reasonableness of—*i.e.*, probable cause for—a lawsuit does not depend solely on the ultimate resolution. *See id.* Termination of litigation is a separate

element from lack of probable cause. *See Siebel*, 161 P.3d at 530. The probable cause inquiry requires a fact-finder to look at the causes of action Blair Construction pleaded in the underlying lawsuit and examine the disputed facts as they appeared at the time of filing or continuing the action, not at the time of ultimate resolution of the prior action.

B. At the Time Blair Construction Filed Its Action, It Relied on Tenable Legal Theories and on Facts It Could Reasonably Believe to be True

[19] We now consider whether Blair Construction asserted reasonable legal theories and factual bases for its claims for relief. This portion of the analysis requires us to review the legal bases and causes of action contained in the underlying complaint. Ultimately, we conclude that the Superior Court did not clearly err in finding Blair Construction had a reasonable basis in law to bring claims for breach of fiduciary duty, fraud, and civil conspiracy. We also conclude that each claim was supported by a sufficient factual and evidentiary basis.

1. Blair Construction's claims for breach of fiduciary duty and fraud had an adequate factual and legal basis

[20] Blair Construction's legal basis for its breach of fiduciary duty and fraud claims was reasonable. The factual crux of Blair Construction's complaint in the underlying action was that Chung engaged in self-dealing while acting as Blair Construction's real estate broker. We have a prior case involving self-dealing by a real estate broker, which contains some similarities to Blair Construction's situation. In *Wilkinson v. Jones*, 2004 Guam 14, this court determined that a real estate broker owes a duty of honesty and fair dealing to a third-party buyer and that a question of fraud is a factual issue. In recognizing that a broker owes a buyer a duty of honesty and fairness, we also recognized the inherent conflict of interest between a buyer and an agent for a seller because they have adverse interests. *Id.* ¶¶ 12-13. Under *Wilkinson*, liability can flow to a real estate broker who represents a seller and fails to honestly and fairly deal with a buyer. *Id.* ¶¶ 14-

15. This duty can be breached “by failing to convey a prospective purchaser’s offer to the seller and by secretly competing with the purchaser.” *Id.* ¶ 15 (quoting *Nguyen v. Scott*, 253 Cal. Rptr. 800, 806 (Ct. App. 1988)). We have also recognized fraud as a potential theory of recovery, which may be premised on the same underlying facts and is a question fundamentally committed to the fact-finder for ultimate resolution. *Id.* ¶ 19 (quoting *Guam Hous. & Urban Renewal Auth. v. Pac. Superior Enters. Corp.*, 2001 Guam 8 ¶ 11).

[21] Also in *Wilkinson*, we discussed the duties a real estate broker owes to his or her principal clients, which includes “disclosing to the principal any personal interest the agent has in the property.” *Id.* ¶ 9. In other cases, particularly those involving attorney-client relationships, we have also found that broad fiduciary duties exist for a client represented by another person. See *Estate of Benavente v. Maquera*, 2000 Guam 9 ¶ 23; *Gayle v. Hemlani*, 2000 Guam 25 ¶¶ 27-32. While liability under these fiduciary duties is limited to damages occurring within the professional relationship, see, e.g., *Fleming v. Quigley*, 2003 Guam 4 ¶¶ 20-30, the liability extends to real estate transactions, *Estate of Benavente*, 2000 Guam 9 ¶¶ 23-25. In *Estate of Benavente*, we imposed liability on an attorney for breaching his fiduciary duties when he obtained land from a client as compensation for services valued significantly below the price of the land. *Id.* We stated that a fiduciary cannot have placed “himself in a position where his self-interest in the transaction prevented his giving disinterested advice.” *Id.* ¶ 23. In applying the same legal principle, the former Appellate Division of the District Court imposed the same duties of unselfishness on corporate board directors. *Dai-Ichi Hotel Overseas Dev. Co. v. Price*, Civ. No. 80-0203A, 1982 WL 33171, at *7-9 (D. Guam App. Div. Nov. 15, 1982). Based on *Wilkinson* and our other prior decisions, a reasonable person could conclude or

advance a tenable argument that liability for breach of fiduciary duty and fraud may extend to a real estate broker or agent accused of self-dealing.

[22] Further contributing to the Superior Court’s finding of reasonableness related to the legal theories, our decision in *Wilkinson* is consistent with the statutory duties imposed on real estate brokers and agents in Guam, *see generally* 21 GCA §§ 104101-104427, and caselaw from other jurisdictions. Guam law allows the Real Estate Commission to suspend or revoke licenses when brokers or agents engage in a range of unethical conduct. *See* 21 GCA § 104302 (2005). Guam’s statutes, and other regulations of real estate brokers and agents, are designed to help “safeguard the public.” *Wilkinson*, 2004 Guam 14 ¶ 14. Similarly, other jurisdictions impose high standards of conduct on real estate brokers. The law in other jurisdictions supporting Blair Construction’s arguments in the underlying action further demonstrates the reasonableness of the breach of fiduciary duty and fraud claims. In California, brokers are subject to a duty of disclosure toward prospective purchasers, which is included in a general duty of honesty and fairness to all parties to a transaction. *See, e.g., Nguyen*, 253 Cal. Rptr. at 806. Further, a California real estate broker may act as a dual agent for both buyer and seller, provided both parties consent to the arrangement after full disclosure. *Horiike v. Coldwell Banker Residential Brokerage Co.*, 383 P.3d 1094, 1095 (Cal. 2016). In these circumstances, however, the broker must exercise utmost care, integrity, honesty, and loyalty. *Id.* at 1097 (citing Cal. Civ. Code § 2079.16 (West)).

[23] In Florida, a broker’s duty prohibits him from using information acquired from a prospective buyer “for his personal aggrandizement.” *See Bush v. Palermo Realty, Inc.*, 443 So. 2d 104, 106 (Fla. Dist. Ct. App. 1983). In New York, real estate brokers have an affirmative duty to not act for a party whose interests are adverse to their principal, *Goldstein v. Dep’t of*

State, Div. of Licensing Servs., 533 N.Y.S.2d 1002, 1003 (App. Div. 1988), and breach of the duty of loyalty to a principal may also constitute an action for fraud, *Precision Glass Tinting, Inc. v. Long*, 740 N.Y.S.2d 138, 139 (App. Div. 2002). In Wyoming, real estate brokers participate in a regulated profession and are required to “meet high standards of honesty, integrity, trustworthiness and competency.” *Hagar v. Mobley*, 638 P.2d 127, 136 (Wyo. 1981); *see also Wilkinson*, 2004 Guam 14 ¶ 14. These duties are owed to the public. *Hagar*, 638 P.2d at 136-37.

[24] In Colorado, a real estate broker or salesperson’s fiduciary duties prohibit him or her from engaging in dual agency—*i.e.*, representing buyer and seller in the same transaction. *Olsen v. Vail Assocs. Real Estate, Inc.*, 935 P.2d 975, 980 (Colo. 1997) (en banc). In Maine, a broker breaches a fiduciary duty owed to a seller-client by not disclosing an agreement to share his commission with a prospective purchaser, where this information may reasonably be expected to influence the principal’s decision. *Goldberg Realty Grp. v. Weinstein*, 669 A.2d 187, 191 (Me. 1996). In Iowa, dual agents owe fiduciary duties to both parties and must disclose all material facts. *Bazal v. Rhines*, 600 N.W.2d 327, 329 (Iowa Ct. App. 1999). The law from these other jurisdictions, which also impose fiduciary obligations on real estate agents and brokers, further demonstrates the reasonableness of the legal theories of breach of fiduciary duty and fraud advanced by Blair Construction in the underlying action.

[25] As Blair Construction had a sufficient legal basis for its breach of fiduciary duty and fraud claims, we must also analyze its factual support. A review of the evidence demonstrates that the Superior Court could conclude a reasonable litigant in Blair Construction’s position could believe that Chung may be liable for breach of fiduciary duty and fraud. First, at the malicious prosecution trial, Chung admitted to being a dual agent for Blair Construction and

Earth Road. *See* Tr. at 25:14-16 (Bench Trial, Oct. 30, 2017). Next, Chung’s signature appears on Earth Road’s annual report as officer or general manager. Chung further admitted that he lied about his status as Earth Road’s officer. Tr. at 31:1-35:25 (Bench Trial, Nov. 1, 2017). Further, Earth Road realized a significant profit of \$800,000 from the transactions that closed the same day. Chung also testified that he did not tell Blair Construction of the purchase price for the Lujan-Earth Road transaction, meaning Blair Construction was not aware of the amount of the gain. Tr. at 24:19-22 (Bench Trial, Oct. 30, 2017). Under *Wilkinson*, Blair Construction could reasonably advance an argument that a real estate broker or agent with a personal interest in the transaction breaches his or her fiduciary duties. Even accepting the finding from the underlying action that Chung disclosed his relationship to Earth Road, Blair Construction could reasonably believe that Chung’s failure to disclose the purchase price of the Lujan-Earth Road transaction was actionable as a breach of fiduciary duty or fraud. Further, Chung’s admission that he lied about his status as Earth Road’s officer could have been viewed by the trial judge as undermining Chung’s credibility. The facts developed at trial support the Superior Court’s conclusion that Blair Construction had a reasonable factual basis for its breach of fiduciary duty and fraud claims. After reviewing the entire record, we find no evidence that leaves us with a definite and firm conviction that the Superior Court made a mistake in ruling on these claims.

2. Blair Construction’s civil conspiracy claim had an adequate factual and legal basis

[26] In addition to claims for breach of fiduciary duty and fraud, Blair Construction also raised an allegation of civil conspiracy. This, too, is not a baseless cause of action. In *Moylan v. Citizens Security Bank*, 2015 Guam 36 ¶ 72, we stated: “Although we have not yet spoken on the legal doctrine of civil conspiracy, the doctrine gives rise to a well-settled cause of action in both federal and state law.” In other jurisdictions, civil conspiracy is either an independent tort, *see*,

e.g., *Allegro, Inc. v. Scully*, 791 S.E.2d 140, 144 (S.C. 2016), or a theory of vicarious liability, *see, e.g.*, *Agar Corp. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 140-43 (Tex. 2019). In both circumstances, the law imposes liability for damages stemming from the actions of two or more people working together to cause harm. *Allegro, Inc.*, 791 S.E.2d at 144; *Agar Corp.*, 580 S.W.3d at 141. While we have yet to address civil conspiracy, malicious prosecution actions are not to be used to prohibit attorneys from pursuing and developing new causes of action, *Garr v. N. Myrtle Beach Realty Co.*, 339 S.E.2d 887, 890 (S.C. Ct. App. 1986). A litigant should be able to pursue a claim on an unsettled question of law without being exposed to a malicious prosecution action. *See id.* Although not yet addressed in Guam, a suit for civil conspiracy—a well-settled cause of action elsewhere—is not the type of meritless legal claim that could support the finding that probable cause was absent or malice was present. Because it is widely recognized elsewhere, we cannot conclude that Blair Construction’s civil conspiracy claim was untenable.

[27] We now must also assess Blair Construction’s factual basis for the civil conspiracy claim. In the underlying action, Blair Construction asserted that Chung conspired with Earth Road and cited Earth Road’s 2007 annual report listing Chung as an officer or general manager of the company. *See* Record on Appeal (“RA”), tab 75 at 3 (Finds. Fact & Concl. L., Apr. 10, 2018). The complaint also named an individual named Kwon Jung Do as a defendant because he signed the sales agreement as a seller along with Chung. *Id.* at 2; *see also* *Blair Constr. Co. v. Chung*, CV1753-09 (Compl., Nov. 24, 2009). These facts alone support a potential claim for civil conspiracy as an independent tort. *See Allegro, Inc.*, 791 S.E.2d at 144. If we couple these facts and allegations with the underlying torts of breach of fiduciary duty and fraud, *see supra* Part IV(B)(2), the claim of civil conspiracy as a form of vicarious liability is also supported. *See*

Agar Corp., 580 S.W.3d at 140-43. On this claim, too, we are not left with a definite and firm conviction that the Superior Court made a mistake.

C. The Superior Court Did Not Clearly Err in Finding Probable Cause

[28] From a review of our caselaw, relevant statutes, and the jurisprudence from other jurisdictions, we find that the legal theories advanced by Blair Construction are not untenable and are supported by law. Like in *Wilkinson*, Blair Construction alleged that the broker had a personal interest in the property being sold and failed to disclose the material facts related to the price of the real estate transaction. The complaint alleges a breach of fiduciary duty, fraud, and civil conspiracy, which we find to be tenable causes of action. We also conclude there was an adequate factual basis to support Blair Construction's claims. The record contains sufficient evidence for the Superior Court to conclude that Blair Construction acted reasonably in pursuing its claims. The Superior Court did not clearly err in finding that probable cause existed for the legal theories upon which relief was sought by Blair Construction. *See Sycamore Ridge*, 69 Cal. Rptr. 3d at 575.

[29] While the Superior Court in ruling for Chung in the underlying action may have rejected Blair Construction's evidence or found certain testimony more credible than others, those findings do not address the reasonableness of a party relying on evidence when initiating or continuing a lawsuit. *See, e.g., Zamos*, 87 P.3d at 811-12. Blair Construction cannot be held to have acted unreasonably solely because the Superior Court in the underlying action ultimately disagreed with Blair Construction's view of the law and the evidence. Indeed, the parties here likely disputed the precise legal standards the judge employed in determining the legal action as evidenced by the appeal taken in the prior action, but ultimately dismissed on technical and not substantive grounds. Post-*Wilkinson*, this court has still not settled all the issues related to self-

dealing by a real estate agent or broker when he or she is admittedly an agent for both parties to a transaction. To decide this case, it is sufficient for us to find that the Superior Court did not clearly err in assessing probable cause. We do not reach the issues left open by *Wilkinson*. See, e.g., *Hemlani v. Hemlani*, 2015 Guam 16 ¶ 33 (declining to address issues “unnecessary to the resolution of the case before it”). However, in light of these unsettled questions, we conclude that a reasonable person in the buyer’s position is not unjustified—*i.e.*, is not lacking probable cause—in bringing a lawsuit when the buyer’s own real estate agent engages in substantial self-dealing, whether disclosed or not. These questions were unsettled at the time Blair Construction brought its lawsuit and remain unsettled today. In view of the facts presented, the Superior Court did not clearly err in determining that a reasonable person could look at the facts available to Blair Construction and maintain an action for breach of fiduciary duty, fraud, and civil conspiracy. In the absence of clear error, we cannot overturn the factual determination of the Superior Court that probable cause existed.

[30] In affirming the Superior Court’s finding of probable cause, we notably do not and need not address the specific issue of whether dual agency by real estate brokers and agents is generally permissible in Guam. That question is not before the court. Blair Construction made reasonable assertions either under current law or in potential progression of the law, and it had facts to support its claims. It is undisputed that Chung prevailed in the underlying litigation; however, that satisfies only the first element of malicious prosecution. In reviewing the facts determined by the Superior Court, we are not left with a definite and firm conviction that the court below reached the wrong result. There was evidence that Chung was a broker for simultaneous transactions resulting in significant profits for a company for which Chung was listed as an officer or manager. A reasonable person in Blair Construction’s position could feel

