Filed 2/4/14 MorilloConstruction v. City of Pasadena CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MORRILLO CONSTRUCTION, INC. Plaintiff, Cross-complainant and Appellant, v. CITY OF PASADENA et al., Defendants, Cross-defendants and Respondents.	B243838 (Los Angeles County Super. Ct. No. GC046088)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jan Pluim, Judge. Affirmed.

Feldman & Associates, Mark A. Feldman and David J. Sire, Jr.; Broedlow Lewis and Jeffrey Lewis, for Appellant.

Michele Beal Bagneris, City Attorney and Javan N. Rad, Assistant City Attorney; Gibbs, Giden, Locher, Turner, Senet & Wittbrodt, Barbara R. Gadbois, Michael B. Geibel and Sara H. Kornblatt, for Respondent.

Morillo Construction, Inc., appeals from the judgment entered dismissing with prejudice its cross-complaint against the City of Pasadena after the trial court sustained the City's demurrer without leave to amend. We affirm because Morillo improperly named the City as a Doe defendant after the statute of limitations ran.

FACTS AND PROCEDURAL HISTORY

In December 2008 Morillo Construction, Inc. and the City of Pasadena entered a written agreement that called for Morillo to serve as the general contractor on a project for the City's Department of Water & Power. Morillo then contracted with Roscoe Steel & Culvert Company, Inc., to serve as a subcontractor on that project. In October 2010 Roscoe sued Morillo for breach of contract, alleging its failure to pay for work performed. The City was named in a cause of action to enforce a statutory stop work notice. (Civ. Code, § 3098, et seq.)

The City cross-complained against Morillo seeking indemnification from Roscoe's action. The City also alleged that Morillo breached their contract by allowing Roscoe and other subcontractors to perform work on a phase of the project without authorization.

On December 7, 2010, Morillo cross-complained against Roscoe for breach of contract, alleging that it failed to perform under the contract and abandoned the project. The second cause of action sought to recover on Roscoe's contractor's license bond. Morillo's third cause of action was for breach of contract, but as to only unnamed Doe defendants.[1] The cross-complaint alleged the existence of Morillo's contract with the City and also alleged that before filing the cross-complaint Morillo had fully complied with the claims presentation requirements for suing a public entity. (Gov. Code, § 910, et seq.)[2] Morillo alleged that its claim was denied, that it had performed all unexcused obligations under the contract, and that the public entity Doe defendants breached the

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[1] Morillo's cross-complaint referred to them as "Foe" defendants but we will use the more commonly used designation of "Doe".

[2] All further undesignated section references are to the Government Code.

contract by delaying various payments and by failing to deal in good faith in regard to change orders and other unspecified matters.

These allegations were false. Instead, Morillo presented two separate claims to the City some months later, in March and April 2011. Those claims were formally rejected on April 25, 2011. On October 20, 2011 – six days before the statute of limitations on actions against public entities was set to expire – Morillo filed a form fictitious name amendment that named the City as one of the Doe defendants in its third cause of action. The City was then served with the cross-complaint.

The City demurred to the cross-complaint on two grounds: (1) Morillo made improper use of the fictitious name amendment procedure (Code Civ. Proc., § 474) because when Morillo filed the cross-complaint, it had not been ignorant of either the City's identity or the facts giving rise to the breach of contract cause of action; and (2) because Morillo falsely pleaded its compliance with the claims presentation requirements, it had effectively filed suit prematurely, in violation of the provisions governing actions against public entities. As a companion to its demurrer, the City asked the trial court to take judicial notice of Morillo's claims and the City's rejection of them.

Morillo opposed the demurrer, contending that its action against the City did not commence until after its claims were rejected and it amended the cross-complaint to name the City as a Doe defendant. Accordingly, the doctrine by which Doe amendments made after the statute of limitations run are deemed to relate back to the original filing date was not applicable and its cause of action was timely. Morillo also contended that it should be granted leave to amend as of right under Code of Civil Procedure section 472.[3]

The trial court overruled the demurrer. The City filed a petition for writ of mandate with this court. On June 6, 2012, we issued an Order to Show Cause or Alternative Writ directing the trial court to reverse itself and enter an order sustaining the demurrer without leave to amend. The trial court did so and we dismissed the writ

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[3] This section applies only if an answer or demurrer has not been filed, and Morillo does not rely on it on appeal.

petition as moot. Morillo then filed a motion for reconsideration, asking the court for leave to file an amended cross-complaint.

Morillo's proposed first amended cross-complaint alleged that at the time it had been sued in the City's cross-complaint, it was unable to name the City as a cross-defendant in its own cross-complaint because it continued working on the project and was "unaware of the facts giving rise to liability on the part of [the] City." This was followed by numerous allegations concerning either work that Morillo continued to perform or change orders made by the City. The proposed pleading concluded by alleging that it was not until the City issued a written change order reducing the scope of the project by more than $5 million that Morillo was aware of its "potential claims" against the City. This was so, Morillo alleged, because a final decision to do so had only then been made by the City's architect. Morillo alleged that it then sought to mediate the dispute, which the contract made a prerequisite to bringing an action. When the City declined to mediate and then rejected Morillo's written claim, "the facts giving rise to liability were finally known for the first time by Morillo," allowing it to file its October 20, 2011, Doe amendment. Accompanying this proposed pleading was a declaration from Morillo's president attesting to these new allegations.

The trial court denied Morillo's reconsideration motion and entered a judgment dismissing Morillo's cross-complaint as to the City.

DISCUSSION

1. *Filing Requirements For Claims Against Government Entities*

Actions for damages against public entities are governed by statutes contained in division 3.6 of the Government Code, commonly known as the Government Claims Act. (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 989.) No public entity may be sued unless a timely written claim for damages was presented to the entity and has been rejected. (§ 945.4.) Claims for personal injury and property damages must be presented within six months after accrual and all other claims must be presented within

one year. (§ 911.2.) The claim must be accepted or rejected within 45 days after it is presented. (§ 911.6, subd. (a).) With exceptions not applicable here, an action must be filed no later than six months after the public entity gives timely written notice that it has rejected a claim. (§ 945.6, subd. (a)(1).)

Filing a claim is a condition precedent to maintaining a cause of action against a public entity and is therefore an element of a cause of action that the plaintiff must prove. (*Di-Campli-Mintz v. County of Santa Clara*, *supra*, 55 Cal.4th at p. 990.) Although there are statutory provisions that provide for liberality in compliance with the claims presentation requirements, the six-month limitation period for bringing an action once a claim has been rejected is strictly construed and will not be extended for any reason. (*Chase v. State of California* (1977) 67 Cal.App.3d 808, 812.)

2. *Law Applicable to Identifying Fictitiously Named Defendants*

Code of Civil Procedure section 474 provides: "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, . . . and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; . . ."

The phrase "ignorant of the name of a defendant" is broadly construed to mean not just the defendant's identity but the facts giving rise to a cause of action as well. (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1170 (*Fuller*).) Even if the plaintiff knows of the existence and actual identity of a fictitiously named defendant, the plaintiff is "ignorant" under Code of Civil Procedure section 474 if he lacks knowledge of that person's connection with the case or with his injuries. Plaintiff's ability to have obtained that knowledge is irrelevant. (*Ibid.*)

The purpose of Code of Civil Procedure section 474 is to allow a plaintiff who is ignorant of the defendant's identity to bring an action in time to avoid being barred by the statute of limitations. (*Eaton Hydraulics Inc. v. Continental Casualty Co.* (2005) 132 Cal.App.4th 966, 974 (*Eaton*).) The point of pleading fictitious defendants under section 474 is to stop the statute of limitations from running against an unknown

defendant. It is not to start a statute of limitations that has not otherwise accrued. (*Ibid.*) Accordingly, a Doe defendant who is substituted by amendment once his true identity is discovered is considered a party to the action from its commencement, so that the statute of limitations stops running as of the date the original complaint was filed. (*Ibid.*)

Ignorance of the identity of a defendant is different from ignorance of the existence of an injury or cause of action. While the latter may delay the running of the statute of limitations until the date of discovery, ignorance of a defendant's identity is not essential to a claim and therefore will not toll the statute. (*Fuller, supra,* 84 Cal.App.4th at p. 1171.) The statute of limitations begins to run when the plaintiff suspects or should suspect that his injury was the result of wrongdoing – that someone has done something wrong to him. Persons suffering damage from another's conduct do not have to know the exact manner in which their injuries occurred or the identities of all parties who may have played a role in causing them. (*Ibid.*) The rationale for this distinction is based on the commonsense assumption that once the plaintiff is aware of the injury, the applicable limitations period – which may be extended by filing a Doe complaint – provides enough opportunity to discover the identity of all those responsible. (*Ibid.*)

3. *Naming the City as a Fictitious Defendant Was Improper*

Morillo contends that naming the City as a fictitious defendant in his cross-complaint was proper because at the time he was "ignorant of the facts giving rise to City's liability . . . ." Determining whether a plaintiff was ignorant of a Doe defendant's identity under Code of Civil Procedure section 474 is essentially a factual determination. Therefore, to the extent the trial court made factual findings, we will affirm if they are supported by substantial evidence. To the extent the trial court drew legal conclusions from the evidence, we exercise de novo review. (*Fuller, supra,* 84 Cal.App.4th at p. 1169; *Balon v. Drost* (1993) 20 Cal.App.4th 483, 487.)

Morillo rejects this standard of review and tries mightily to have us review this purely under the de novo standard applicable to orders sustaining demurrers generally, contending that we must accept as true the allegations of its cross-complaint that it was

ignorant of the facts giving rise to the City's liability. If this were so, no defendant could ever challenge a Doe amendment on the ground that it did not satisfy the requirements of Code of Civil Procedure section 474. Instead, as the decisions cited above make clear, the trial court evaluates the evidence concerning the plaintiff's knowledge when determining such a challenge.

Morillo also asks us to consider – and accept as true – the allegations of its proposed amended cross-complaint when analyzing this issue. However, the allegations of the proposed first amended cross-complaint were not before the trial court when it sustained the City's demurrer, and Morillo did not contend that such facts existed at the hearing on that motion or in its opposition to the City's writ petition. Because we may review a trial court ruling based only on those matters put before the court by the parties, we may not consider the proposed first amended cross-complaint when reviewing the order sustaining the demurrer to the initial cross-complaint.[4] (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2.)

In reliance on the way it has framed the issue, Morillo's opening appellate brief does not analyze the issues in light of the evidence before the trial court. Morillo does attempt to tackle this issue in its appellate reply brief because the City raised it as part of its appellate respondent's brief. Because the issue was first raised in the reply brief, we deem it waived. (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1216-1217.)

We alternatively conclude on the merits that Morillo's use of section 474 was improper. In its appellate reply brief, Morillo contends that it properly used Code of Civil Procedure section 474 because the City had not yet rejected its claim when its cross-complaint was filed. By doing so, Morillo conflates its ability to file suit against the City until it filed a claim that was rejected with ignorance of the facts giving rise to liability.

As numerous decisions make clear, the purpose of section 474 is to allow a plaintiff to sue unknown persons who are responsible for his injuries *after* a cause of

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[4] We do consider that proposed pleading in connection with the denial of Morillo's motion for reconsideration, however.

action has accrued. (See *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 942 [a plaintiff can employ section 474 if he is ignorant of facts "that give rise to a cause of action"]; *Eaton, supra,* 132 Cal.App.4th at p. 974 [purpose of section 474 is to stop statute of limitations from running, not to start limitations period that has not otherwise accrued]; *Lipman v. Rice* (1963) 213 Cal.App.2d 474, 478 (*Rice*) [purpose of section 474 is to help a plaintiff who is truly ignorant of "someone against whom he states a cause of action"].)

It is important to remember that Morillo's cross-complaint was a response to the City's cross-complaint against it, which alleged that Morillo breached their contract by performing work on project phase 2A that it had been directed not to perform. In its cross-complaint, Morillo alleged and attached as an exhibit its contract with the City and alleged that it had been hired to perform phases 2A and 2B of the project. In addition to (falsely) alleging full compliance with the Government Claims Act, Morillo alleged that it had fully performed under the contract and that the Doe defendant – which could have been no one other than the City – breached the contract in several respects, including delaying progress and change order payments and otherwise acting in bad faith.[5] These allegations make clear that Morillo believed it had incurred actual damages from the City's supposed breaches of contract. In short, Morillo was not ignorant of the facts giving rise to liability by the City. Instead, as Morillo itself claims, it was simply too soon to sue the City because of the requirements of the Government Claims Act.

Nothing in Code of Civil Procedure section 474 or the decisions interpreting it even suggests that a plaintiff may name as a fictitious defendant someone who he knows has caused him harm but whom he does not yet have the ability to sue because a necessary predicate to maintaining a cause of action has not yet occurred. The proper course in such a case would be to amend the pleading to add that party as a defendant

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[5] Morillo does not dispute that its Doe allegations were intended to apply to the City.

once the cause of action may be maintained.[6] Because Morillo did not properly name the City as a fictitious defendant, the statute of limitations expired and the order sustaining the demurrer without leave to amend was therefore proper. (*Lipman, supra,* 213 Cal.App.2d at pp. 480-481.)

4. *The Motion For Reconsideration Was Properly Denied*

The lion's share of Morillo's appellate arguments is devoted to the proposed first amended cross-complaint that was the basis of its motion for reconsideration. To the extent Morillo relies on the allegations of that proposed pleading, it once again misconstrues the nature of the issues before us. As discussed previously, a challenge to a section 474 amendment is primarily factual. Therefore, the allegations of the proposed

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[6] Fewer than a handful of decisions have construed section 474 in light of the claims filing requirements for suing a public entity, but dicta in one supports application of this principle here. The court in *Olden v. Hatchell* (1984) 154 Cal.App.3d 1032 considered whether a plaintiff suing a county for injuries sustained while in jail could use section 474 to add the names of the deputies involved in his injuries when he learned their identities after the county rejected his claim and he sued the county within the limitations period. The *Olden* court held that this was a proper use of section 474 because the Government Claims Act did not apply to actions against employees of public entities. (*Id.* at pp. 1036-1037.) In distinguishing between actions against public entities and their individual employees, the court said: "Indeed, because presentation of a claim to a public entity is a prerequisite to bring suit against it (§ 945.4), it appears that a plaintiff could never effectively utilize a fictitiously named defendant to bring in a public entity defendant. Either his action would be barred for failure to present a claim, or he would know the identity of the entity to whom he had presented the claim and thus not be ignorant of its name." (*Ibid.*, fn. omitted.)

The court in *Carlino v. Los Angeles County Flood Control Dist.* (1992) 10 Cal.App.4th 1526, 1536, said in dicta that it found *Olden's* comment unpersuasive. However, *Carlino* considered a very different set of circumstances: whether a plaintiff could add a county flood control district as a Doe defendant after the limitations period expired when it timely sued the county itself, which was alleged to be the flood control district's governing body. The Court of Appeal reversed the order sustaining the flood control district's demurrer because: (1) it had to accept as true the plaintiff's allegations that the county board of supervisors was the proper body with which to file a claim; and (2) because the board of supervisors had ultimate control of the flood district, the plaintiff had substantially complied with the claims filing requirements. (*Id.* at pp. 1533, 1535-1536.)

amended pleading are not determinative of the issue and we are not, as Morillo contends, obliged to presume they are true.

A party may bring a motion for reconsideration based on a showing of new or different facts. (Code Civ. Proc., § 1008, subd. (a).) The party seeking reconsideration must also provide a satisfactory explanation for the failure to produce it at an earlier time. (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457.) Morillo's proposed amended cross-complaint included numerous allegations concerning Morillo's continued performance under either the contract or change orders made to it. At bottom, however, the proposed pleading is just a variation of Morillo's contentions concerning its original cross-complaint – that until it filed a claim and the City rejected it, no action could be brought. These allegations were supported by the declaration of Morillo's president, which constitutes the only source of evidence before the trial court.

As discussed in section 3., such contentions do not alter the fact that the City could not have been sued under a fictitious name precisely because a cause of action was premature. Furthermore, we proceed on a silent record. The trial court's minute order gives no reason for its ruling and the record does not include a reporter's transcript of the hearing on the reconsideration motion. As a result, we indulge all presumptions and intendments in favor of the trial court's order. (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.) We believe the trial court could have found that even though the precise intervening steps between the time Morillo filed its cross-complaint and the denial of its claim by the City were unknown, the key facts were that Morillo had not yet filed its claim and that until and unless the City rejected it, there would be no basis to sue. Given the silent record, we presume that such a finding was made.

DISPOSITION

The judgment of dismissal is affirmed. Respondent shall recover its appellate costs.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.