Filed 7/31/12 Sandler v. San Wall Properties CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LAURENCE SANDLER, Plaintiff, Cross-Defendant and Appellant, v. SAN WALL PROPERTIES, et al. Defendants, Cross-Complainants and Respondents.	2d Civil No. B234643 (Super. Ct. No. 56-2008-00321836-CU-BC-VTA) (Ventura County)

This matter concerns the validity of an $800,000 promissory note payable by San Wall Properties, LLC, (San Wall) to Laurence Sandler. Sandler sued San Wall for breach of the promissory note. Sandler appeals from the judgment entered in favor of respondents San Wall, ProCare Hospice Corp. (ProCare), and FCMS Corp. (FCMS) declaring that Sandler has no entitlement to any money on the note. We affirm.

Factual and Procedural Background

Respondents ProCare and FCMS are owned in equal 25 percent shares by appellant, appellant's former wife (Lisa Sandler), Roberta Walski, and Walski's husband (David Walski). Roberta Walski owns 50 percent of respondent San Wall,

while appellant and his former wife each own 25 percent. Until January 2006, appellant was respondents' chief financial officer.

In July 2004 appellant and Roberta Walski signed on behalf of San Wall an $800,000 promissory note payable by San Wall to appellant. They also signed a second $800,000 promissory note payable by San Wall to Roberta Walski.

In June 2008 appellant filed an action against San Wall for breach of the promissory note payable to him. Appellant alleged that the promissory note evidenced a loan of $800,000 that he had made to San Wall. Appellant's complaint prayed for damages in the amount of the unpaid principal balance of the note – $725,000 – plus interest.

San Wall filed a cross-complaint for declaratory relief against appellant, ProCare, and FCMS. The cross-complaint stated that San Wall "disputes the validity of the promissory note" payable to appellant. The cross-complaint alleged that the promissory notes payable to appellant and Roberta Walski "memorialize[d] . . . sham loan transactions." The funds referred to in both notes came from ProCare and FCMS, but appellant "modified the corporate records of San Wall to show that these funds were personal loans from himself and Roberta Walski to San Wall." "[T]he monies claimed by [appellant] from the promissory note [payable to him] are actually investment funds owed to Procare and FCMS." San Wall requested "a declaration as to the validity of the promissory note [payable to appellant], and if the promissory note is valid, whether the obligation to repay the same is owed to [appellant] or Procare and FCMS."

ProCare and FCMS filed a cross-complaint against appellant and San Wall. The cross-complaint sought a declaration "that the Promissory Note is invalid in that [appellant] and Roberta Walski did not make personal loans of $800,000 each to San[]Wall, that the $800,000 referenced in the Promissory note was in fact transferred from ProCare and FCMS to San Wall, that [appellant] concealed the transfer of the $800,000 . . . by modifying ProCare and FCMS' corporate books while he was a

director of both corporations, and that the $800,000 . . . must be repaid by San Wall to ProCare and FCMS, not to [appellant]." The cross-complaint also sought an accounting from appellant and San Wall.

The trial court granted appellant's and San Wall's request for a jury trial on appellant's legal cause of action for breach of the promissory note. Concurrently with the jury trial, the court tried respondents' equitable causes of action for declaratory relief and an accounting. During the trial, ProCare and FCMS dismissed their cause of action for an accounting.

The jury rendered a special verdict. As to the cause of action for breach of the promissory note, it found: (1) appellant and San Wall entered into an agreement whereby appellant would loan $800,000 to San Wall; (2) pursuant to the agreement, appellant transferred $800,000 to San Wall; (3) the entire $800,000 was a loan; (4) San Wall repaid $75,000 of the loan; and (5) San Wall is liable for damages of $725,000 plus interest. The jury was not asked to find who was entitled to recover damages.

As to respondents' causes of action for declaratory relief, the jury rendered what was designated as an "advisory verdict" finding that appellant, not FCMS, was entitled to recover the entire amount of damages.

After the jury had rendered its special verdict, the trial court heard argument on respondents' causes of action for declaratory relief. Contrary to the jury's special verdicts, the trial court concluded that "the right to receive repayment of the remaining $725,000 claimed by [appellant] . . . is the property of [FCMS], the source of the funds for the $800,000 [transferred by appellant to San Wall]." Accordingly, the court ordered that appellant shall "take nothing by way of his Complaint." The court also concluded that the $800,000 referred to in San Wall's promissory note payable to Roberta Walski was transferred to San Wall by ProCare. Therefore, ProCare has "the right to receive repayment" of the remaining balance of $725,000 due on that note.

The trial court explained its decision in a detailed 12-page statement of decision. The court found that appellant "had a history of transferring money from FCMS and ProCare to himself and creating false documents and false accounting entries to hide the transfers."[1] Appellant had "similarly caused the transfers of money to San[]Wall from FCMS and ProCare to be disguised in FCMS and ProCare's books in order to claim it as a personal loan repayable to himself and a personal loan repayable to Ms. Walski." "Therefore, any damages arising from San[]Wall's failure to make . . . repayments [on the promissory notes] belong to FCMS and ProCare, and [appellant] has not been damaged thereby."

Statement of Decision

Appellant contends that the statement of decision "is not entitled to deference in this Court, both because of the way it was created and the many errors it contains." As to "the way it was created," appellant objects that "the court signed [respondents'] proffered statement of decision without making any changes." Thus, "[t]he Statement of Decision was made with absolutely no input from the trial court as to what [it] believed were the reasons why cross-complainants were entitled to judgment." This argument is forfeited because it is unsupported by citations to the record. (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.)

Even if the trial court had accepted verbatim respondents' proposed statement of decision, it would still be entitled to deference: " 'The preparation of a statement of decision should place no extra burden on the trial courts. A party may be, and often

[1] In its statement of decision, the trial court noted: "In a separate action, *FCMS Corp. and ProCare Hospice Corp. vs. Sandler, et al.*, . . . which went to trial on February 2, 2010, [appellant] was found by a jury to have breached his fiduciary duties to FCMS and ProCare and of having entered into a civil conspiracy to breach his fiduciary duties to FCMS and ProCare, amongst other wrongful acts." In his opening brief, appellant alleges: "In February of 2010, a Ventura Superior Court jury returned a verdict in favor of FCMS (but not Pro[C]are) and against [appellant] and his co-defendants. [Appellant] was ordered to pay $75,000 in compensatory damages and $275,000 in punitive damages."

should be, required to prepare the statement.' [Citation.] A trial court may then select which findings it agrees with as supported by the evidence and adopt them, rather than having to prepare a statement of decision from scratch. That a court does so creates no inference that it has failed to engage in a thoughtful weighing of the evidence, and does not license us to ignore its findings of fact. [Citation.]" (*J.H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, 984.) In the *McKnight Ranch* case, "the trial court adopted virtually all of McKnight's proposed statement of decision." (*Ibid*.) Nevertheless, the appellate court "decline[d] to displace the trial court from its role as fact finder and review its findings de novo." (*Ibid*.)

As to appellant's argument that the statement of decision contains "many errors," this argument is also forfeited because it is unsupported by citations to the record. (*Nielsen v. Gibson*, *supra*, 178 Cal.App.4th at p. 324.) Even if the argument had been supported by record citations, with one exception the alleged errors would have been forefeited because appellant did not specifically object to them in the trial court. (*In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 346.) The one exception is the trial court's determination that the $725,000 balance due on the note payable to Roberta Walski is actually owed to ProCare instead of Walski. In his written objections to the statement of decision, appellant objected to the trial court's adjudication of "claims of Pro[C]are . . . that were . . . asserted against Roberta Walski, a non-party to the action."

We need not determine whether the trial court erroneously adjudicated ProCare's claim against Walski in the statement of decision. The adjudication may have prejudiced Walski, but appellant has not shown how it prejudiced him. Because appellant owned 25 percent of ProCare, it appears that the adjudication could have only been to his benefit. Therefore, any mistake in the statement of decision regarding the Walski promissory note does not constitute reversible error because it was harmless. (*In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1062-1063.)

Alleged Abandonment of Cross-Complaint by FCMS and ProCare

Appellant argues that FCMS and ProCare abandoned their cross-complaint because they "sat in silence" when the jury delivered its special verdict and the trial court "pronounced [appellant] the winner." "At that point," appellant asserts, "the single trial of all parties' claims was over, including the cross-complaint of FCMS and Pro[C]are. By not asserting that the cross-complaint for declaratory relief remained to be decided, FCMS and Pro[C]are abandoned that claim."

Appellant's claim of abandonment is forfeited because it is not supported by citation to legal authority. (*County of Butte v. California Emergency Medical Services Authority, Inc.* (2010) 187 Cal.App.4th 1175, 1196.) In any event, an abandonment did not occur because the jury's special verdict stated that its findings on the causes of action for declaratory relief were merely "advisory." All of the parties, therefore, were put on notice that these causes of action remained to be decided. "[W]hile a jury may be used for advisory verdicts as to questions of fact [on equitable issues], it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper. [Citation.]" (*A-C Co. v. Security Pacific Nat. Bank* (1985) 173 Cal.App.3d 462, 474.)

Jury Trial

Appellant argues that he was entitled to a jury trial on the issues raised by respondents in their cross-complaints for declaratory relief: "[Appellant] was entitled to have the jury decide all issues regarding the validity and ownership of the note." "No cross-complainant could deny [him] his right to have these issues decided by a jury, merely by seeking a declaration that the loan agreement was not valid or that [appellant] was not entitled to damages."

"The California Constitution guarantees the right to a jury trial. (Cal. Const., art. I, § 16.) But the right applies only to a civil action as it existed at common law in 1850, when our Constitution was adopted. [Citation.] There is no right to a jury trial in an action in equity. [Citation.] In determining whether the action is one triable by

jury at common law, the court is not bound by the form of the action. [Citation.] Instead, the court looks to the gist of the action; that is, the nature of the rights involved and the particular facts of the case. [Citation.] Whether the action is legal or equitable is ordinarily to be determined by the type of relief to be afforded. [Citation.]" (*Baugh v. Garl* (2006) 137 Cal.App.4th 737, 740.) Where an action involves both equitable and legal issues, the parties are "entitled to have the equitable issues tried by the court without a jury, and the . . . legal issues submitted to a jury." (*Thomson v. Thomson* (1936) 7 Cal.2d 671, 681.) "The issue whether [appellant] was constitutionally entitled to a jury trial . . . is a pure question of law that we review de novo. [Citation.]" (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 23.)

"[A] true action for declaratory relief is equitable." (*Caira v. Offner*, *supra*, 126 Cal.App.4th at p. 24.) But as appellant notes in his opening brief, "[A] plaintiff [cannot] be deprived of his right to a jury trial of an action for damages on a promissory note, by the expedient of a defendant asserting a cross-complaint for 'declaratory relief' as to the validity of the note." "[T]he 'courts will not permit the declaratory action to be used as a device to circumvent the right to a jury trial in cases where such right would be guaranteed if the proceeding were coercive [e.g., an action seeking damages] rather than declaratory in nature.' [Citations.]" (*State Farm Mut. Auto. Ins. Co. v. Superior Court of the City and County of San Francisco* (1956) 47 Cal.2d 428, 432; see also *Patterson v. Insurance Co. of North America* (1970) 6 Cal.App.3d 310, 315 ["Where an action for declaratory relief is in effect used as a substitute for an action at law for breach of contract, a party is entitled to a jury trial as a matter of right"].)

Instead of being a true action for declaratory relief, San Wall's action was in effect an attempt to defeat appellant's cause of action at law seeking damages from San Wall for breach of the promissory note. San Wall sought to have the promissory note declared invalid. Its action for declaratory relief could not "be used as a device to circumvent" appellant's right to a jury trial on this issue. (*State Farm Mut. Auto. Ins.*

Co. v. Superior Court of the City and County of San Francisco, supra, 47 Cal.2d at p. 432.)

On the other hand, ProCare's and FCMS's cross-complaint alleged a true action for declaratory relief. Unlike San Wall, appellant did not seek damages from ProCare or FCMS. Nor did ProCare or FCMS seek damages from appellant. They were not parties to appellant's action or to the underlying promissory note. Instead of seeking coercive relief, ProCare and FCMS sought a declaration of their rights as to the $800,000 that appellant had transferred to San Wall. "[A] declaratory judgment action may be brought to establish rights once a conflict has arisen." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 898.) Thus, ProCare's and FCMS's declaratory relief action was properly tried by the court. The court's resolution of this equitable action was dispositive of appellant's legal action for breach of the promissory note.

Appellant contends that we should not draw a distinction between San Wall, ProCare, and FCMS because Roberta Walski controlled all three companies. Appellant's contention is forfeited because it is not supported by citations to the record or legal authority. (*County of Butte v. California Emergency Medical Services Authority, Inc.*, *supra*, 187 Cal.App.4th at p. 1196.) Appellant presents no argument justifying the "piercing of the corporate veil" of ProCare and FCMS. (See *Minifie v. Rowley* (1921) 187 Cal. 481, 487.)

Moreover, appellant waived the right to a jury trial on the declaratory relief issues. He insisted that there was no right to a jury trial on these issues. (*People v. $17,522.08 United States Currency* (2006) 142 Cal.App.4th 1076, 1084.) For example, before the trial began, appellant's counsel stated in open court: "They [ProCare and FCMS] have a claim for declaratory relief and accounting. . . . [T]hey are not entitled to a jury determination of either of those claims . . . ." "The jury doesn't get" to decide who is the owner of the promissory note. During the trial, counsel objected to the advisory verdict portion of the special verdict form. Counsel

declared: "[H]aving heard all the evidence, you [the court] don't need the jury to tell you whether there ought to be a declaration."

Trial Court's Refusal to Allow Appellant to Amend Answer to Allege Affirmative Defense

After ProCare and FCMS had rested, appellant moved to dismiss their cause of action for declaratory relief on the ground that it was barred by the statute of limitations. ProCare and FCMS contended that the motion was "not appropriate" because "there's no affirmative defense for statute of limitations." Appellant replied that he should be permitted to amend his answer to allege the affirmative defense. The trial court denied the motion to dismiss "because it is not timely made." Appellant argues that the trial court abused its discretion in not allowing him to amend his answer to allege a statute of limitations affirmative defense.

The trial court did not abuse its discretion in view of the lateness of appellant's request to amend and his failure to provide an excuse for the delay. (See *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 613.) Moreover, appellant has failed to show that he was prejudiced by the alleged abuse of discretion. He presents no argument explaining why he would have prevailed on the statute of limitations affirmative defense. Indeed, appellant does not even specify the applicable statute of limitations. He merely asserts that "under any conceivable period of limitations, FCMS and Pro[C]are waited too long to assert their claim." "[W]e cannot presume prejudice and will not reverse the judgment in the absence of an affirmative showing there was a miscarriage of justice. [Citations.] . . . Because [appellant] has failed to establish prejudice, [his] claim of error fails." (*Century Sur. Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963.)

Request for Sanctions

In their brief, ProCare and FCMS request that we impose sanctions against appellant for failing to support his arguments with citations to the record and legal authority. We deny their request because they have not filed a separate motion for

sanctions that "must include a declaration supporting the amount of any monetary sanction sought." (Cal. Rules of Court, rule 8.276(b)(1); see also *Committee to Save Beverly Highlands Homes Ass'n v. Beverly Highlands Homes Ass'n* (2001) 92 Cal.App.4th 1247, 1273, fn. 10; *Leko v. Cornerstone Building Inspection Service* (2001) 86 Cal.App.4th 1109, 1124.)[2]

Disposition

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

[2] "In its respondent's brief, [San Wall] has requested an award of attorney fees on appeal. We decline to consider its request. California Rules of Court, rule 3.1702(c) sets forth the procedure for claiming attorney fees on appeal. (See also Cal. Rules of Court, rule 8.278(d)(2).)" (*Tesoro Del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 642, fn. 7.)

Charles McGrath, Judge

Superior Court County of Ventura

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