Filed 2/28/12 The Ephraim and Hilda Fey Family Limited Partnership v. Commonwealth Title Co. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE EPHRAIM AND HILDA FEY FAMILY LIMITED PARTNERSHIP, Plaintiff and Appellant, v. COMMONWEALTH LAND TITLE COMPANY et al., Defendants and Respondents.	B231400 (Los Angeles County Super. Ct. No. BC411601)

APPEAL from judgments of the Superior Court of Los Angeles County. John P. Shook, Judge. Affirmed.

Owens & Gach Ray, Robert B. Owens and Linda Gach Ray for Plaintiff and Appellant.

Freeman, Freeman & Smiley, Gregory M. Bordo and Jared A. Barry for Defendants and Respondents Commonwealth Land Title Company, Commonwealth Land Title Insurance Company and Lawyers Title Insurance Company.

This appeal[1] is from judgments of dismissal following the sustaining of a general demurrer without leave to amend to the Second Amended Complaint in favor of defendants Commonwealth Land Title Company and Commonwealth and Title Insurance Company (collectively, Commonwealth) and defendant Lawyers Title Insurance Company (LTIC). In this complaint, plaintiff The Ephraim and Hilda Fey Family Limited Partnership (FFLP) alleged damages of not less than $2 million arising from the negligence of Commonwealth and LTIC, which caused the recording of a void grant deed to FFLP's apartment building leading to the payment of over $1 million to the fraudulent grantee through a loan secured by a deed of trust on this property and which exposed FFLP to a foreclosure action by the lender upon the grantee's default. The trial court (Judge John Shook) sustained the demurrers for failure to state a cause of action without leave to amend, because FFLP failed to allege facts to show Commonwealth owed FFLP any duty of care and no amendment could cure these defects. We affirm the judgment.

BACKGROUND

The operative complaint alleged:[2] About December 1999, when the limited partnership FFLP was formed, Ephraim Fey and Hilda Fey, as husband and wife, were its only general partners. About November 13, 2005, upon Hilda's death, Ephraim became the sole general partner. From about 2000, FFLP became the rightful owner of certain "real property located at 1138 North Louise Street, Glendale, CA 91207 consisting of a 10-unit apartment building and appurtenant structures (the 'Property')."

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[1] A notice of appeal was filed by Lawyers Title Insurance Company. A separate notice of appeal was filed by Commonwealth Land Title Company and Commonwealth and Title Insurance Company. We have consolidated these appeals for argument and disposition.

[2] All facts are taken from the Second Amended Complaint which for purposes of this demurrer are taken as true.

Keith Fey, a son of Ephraim and Hilda, is not and never was a general partner of FFLP. At some point, "the Galletly Defendants,[3] and each of them, acting in concert with each other, falsely and fraudulently prepared a document purporting to be an agreement of limited partnership of [FFLP], and which false and fraudulent document purports to state that Keith is a general partner of [FFLP] (the 'Forged Partnership Agreement'), which he is not." The Forged Partnership Agreement substituted "Keith, instead of Hilda, [as] a general partner of [FFLP and stated he] was a general partner of [FFLP] as of December 20, 1999, which he was not."

About November 2007, the Galletly Defendants "fraudulently created, or caused to be created, a document purporting to be a Grant Deed of the Property (the 'Fraudulent Grant Deed'), which Fraudulent Grant Deed was prepared with the intention of purportedly transferring the Property from [FFLP] to Defendant Grove." This Fraudulent Grant Deed is void, because, although bearing the purported signature of Keith, "Keith is not, and never has been, a general partner of [FFLP], and Keith did not have the authority to sign a Grant Deed of, or otherwise transfer title to, the Property."

About December 2007, the Galletly Defendants recorded the Fraudulent Grant Deed in furtherance of their scheme to obtain money through "a loan or loans secured by the Property," which recording operated to enable the Galletly Defendants "ostensibly [to] transfer[] ownership of, and title to, the Property from [FFLP] to Defendant Grove (the 'Fraudulent Property Transfer')."

"[T]he Fraudulent Property Transfer was accomplished through an escrow (the 'Escrow'), in which [Commonwealth] issued a policy of title insurance, and in which Defendant LandAmerica served as the escrow holder."

"[A]bout April 2, 2008, the Galletly defendants obtained a loan of approximately $1,210,000, which was increased approximately two months later to $1,371,000

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3 "The Galletly Defendants" are alleged to be Greg Galletly; Dorn-Platz Properties, Inc; Brad Barnes; BABBB, LLC; DLG Family Limited Partnership; Grove Residential Investments, LLC (Grove); and Does 1 through 20. None of these defendants is a party to the demurrers or to these appeals.

(collectively, the 'Fraudulent Loan') from Defendant Dove Street, and in connection with the Fraudulent Loan, an entity called 'Grove Residential Apartments, LLC' signed a purported Deed of Trust in favor of Dove Street, purportedly encumbering the Property, which deed of Trust was subsequently modified (collectively, the 'Fraudulent Deed of Trust')." This Fraudulent Deed of Trust is void, "because, among other things (a) the Fraudulent Deed of Trust was not signed by the actual purported Trustor," namely, Defendant Grove, "the entity purportedly on title when the Fraudulent Loan was made, and (b) in any event, since the Fraudulent Grant Deed was and is void, title to the Property never passed to Grove[.]"

"[T]he Galletly Defendants, and each of them, have defaulted on the payments to Defendant Dove Street required by the Fraudulent Loan, [which] is therefore now in default." Defendant Dove Street has "threatened to foreclose its lien on the Property but was prohibited from doing so by the preliminary injunction obtained in this lawsuit by [FFLP]."

FFLP was unaware of the Fraudulent Grant Deed, the Fraudulent Property Transfer, the Fraudulent Loan, or the Fraudulent Deed of Trust until about December 2008.

Commonwealth was named as a defendant only in the eighth cause of action for negligence, which allegedly led to the recording of the Fraudulent Grant Deed and the ensuing Fraudulent Property Transfer through escrow.

LTIC was named as a defendant only in the ninth cause of action for negligence in carrying out its duties "required by, and as part of, the Escrow and Escrow instructions[.]"

On January 28, 2011, the trial court sustained the demurrer of Commonwealth and the separate demurrer of LTIC on the ground of failure to allege sufficient facts, namely, any duty owed to FFIC by these defendants, to state a cause of action and without leave to amend, because the defects in the complaint could not be cured by amendment. The court then dismissed the action as to Commonwealth and LTIC.

On February 24, 2011, notices of entry of judgment were filed. On March 4, 2011, FFLP filed a notice of appeal from each judgment.

DISCUSSION

1. Standard of Review

"'A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed [citation]. The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. [Citation.]' (Citation.)" (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.)

No appeal lies from an order sustaining a demurrer without leave to amend. Rather, the appeal is taken from the judgment of dismissal following such order. (See, e.g., *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The standard of review is de novo. (*Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 853.)

On appeal, courts must assume the truth of the properly pleaded or implied factual allegations of the complaint, "'but not contentions, deductions or conclusions of fact or law.'" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The reviewing court must read the complaint in context and give it a reasonable interpretation. Where the trial court sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of action. Where the demurrer is without leave to amend, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. If this is the case, we shall conclude the trial court abused its discretion and reverse, but, if not, no abuse of discretion has occurred. The plaintiff has the burden of proving that an amendment would cure the defect. (*Ibid.*)

2. Duty Threshold Element of Negligence

"There are four elements to actionable negligence: (1) a duty, (2) a breach of that duty which (3) proximately causes (4) an injury to a plaintiff to whom the duty is owed." (*DeArmond v. Southern Pacific Co.* (1967) 253 Cal.App.2d 648, 655.)

The key element of a negligence cause of action is duty. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 57.) "Without such a duty, any injury is injury without wrong. [Citations.] 'The existence and scope of duty are legal questions for the court.' [Citations.]" (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 163 (*Coldwell Banker*).) "'Duty' is simply '"an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."' [Citation.] 'Courts, however, have invoked the concept of duty to limit generally "the otherwise potentially infinite liability which would follow from every negligent act. . . ."' [Citation.]" (*Id.* at p. 164.) "The existence of such a duty must appear in the allegations of the complaint as a necessary prerequisite essential to the statement of a cause of action[.]" (*Neuber v. Royal Realty Co.* (1948) 86 Cal.App.2d 596, 611, disapproved on another point in *Porter v. Montgomery Ward & Co.* (1957) 48 Cal.2d 846, 850.)

"'Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability.' [Citation.]" (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588.) "However, foreseeability is not a substitute for legal duty. [Citation.] Rather, foreseeability of harm is merely one factor to be considered in imposing negligence liability. [Citations.]" (*Coldwell Banker, supra,* 117 Cal.App.4th at p. 167.)

"The mere existence of foreseeability of harm to persons other than parties to the real estate transaction is, for public policy reasons, not sufficient to impose liability on a supplier of information in a commercial context. [Citations.]" (*Coldwell Banker, supra,* 117 Cal.App.4th at p. 167.) Similarly, allegations of affirmative conduct and willful misconduct alone are insufficient to create a duty of disclosure. Whether a duty of disclosure is owed to the plaintiff, and thus whether a breach of duty is willful or negligent is addressed in this context, namely, whether any duty is owed. (*Id.* at pp. 167-168.)

"To state a cause of action for professional negligence, a party must show '(1) the duty of the professional to use such skill, prudence and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence.' [Citation.] 'The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion.' [Citation.] 'Where there is no legal duty, the issue of professional negligence cannot be pled because with the absence of a breach of duty, an essential element of the cause of action for professional negligence is missing.' [Citation.]" (*Giacometti v. Aulla, LLC* (2010) 187 Cal.App.4th 1133, 1137 (*Giacometti*).)

3. No Legally Cognizable Duty Owed by Commonwealth Pleaded

In its eighth cause of action for negligence, FFLP pleaded Commonwealth owed FFLP a duty of care, which it breached, based on two legal theories. FFLP alleged Commonwealth owed FFLP "a duty of care of professionals, which includes title insurance companies, and [Commonwealth's] insuring of title without determining whether the person whose signature was on the Fraudulent Grant Deed was a general partner of [FFLP] fell below the standard of care for professional title insurance companies." "While an insured under a title policy may have no claim against the title insurer except for a contract claim under the policy, a third party (such as [FFLP]) injured by the negligent acts and omissions of a title insurer can maintain such a claim."

FFLP alternatively pleaded that, aside from such professional duty, Commonwealth "voluntarily undertook and assumed a duty towards [FFLP] by requiring as part and parcel of issuing the Title Policy that Ephraim, the sole general partner of [FFLP], consent to the transfer of the Property." Such voluntary duty arose through Commonwealth's actions in: (1) preparing the affidavit for Ephraim, as FFLP's general partner, to sign and to be notarized prior to close of escrow "evidencing" the consent of Ephraim and FFLP "to the purported transfer of the Property to Grove"; and (2) requiring

prior to close of escrow a certified copy of FFLP's LP1 to enable Commonwealth to verify "the signer of the Fraudulent Grant Deed was in fact a General Partner of [FFLP]."

Commonwealth allegedly breached its "general duty or the voluntarily undertaken or assumed duties" by failing to communicate with Ephraim regarding the pending Fraudulent Property Transfer; to deliver the affidavit it had prepared for Ephraim, as FFLP's general partner, to sign and notarize prior to close of escrow "evidencing" the consent of Ephraim and FFLP "to the purported transfer of the Property to Grove (the 'Affidavit'), because, among other things it appeared that there were irregularities to the identity of the seller and whether Keith was a general partner of [FFLP]"; and to obtain the LP1 for FFLP, which Commonwealth required and which would have disclosed whether "the signer of the Fraudulent Grant Deed was in fact a general partner of [FFLP].

In short, the negligence of Commonwealth allegedly consists of its "acts and omissions in failing (a) to learn that Keith was not a general partner of [FFLP], (b) to learn that the Fraudulent Grant Deed was void, (c) to learn that Ephraim and [FFLP] did not consent to the transfer of title to the Property, (d) to comply with their own requirements to obtain the LPI and the Affidavit and to communicate with Ephraim, and (e) to prevent the Fraudulent Property Transfer[.]"

The facts alleged by FFLP are insufficient to satisfy the threshold duty of care element of a negligence cause of action. "The general rule is that privity of contract is a requisite to a professional negligence claim. [Citation.]" (*Giacometti, supra*, 187 Cal.App.4th at p. 1137.) As conceded in the complaint, no privity of contract exists between it and Commonwealth.

Side-stepping the legal duty issue, the complaint merely alleged: "[A] third party (such as [FFLP]) injured by the *negligent* acts and omissions of a title insurer can maintain such a claim." This conclusory allegation does not inform on the issue of the existence or nonexistence of any duty of care owed to FFLP by Commonwealth. "[N]egligent" in this context is simply an adjective signifying the acts and omissions were "characterized by negligence; careless; heedless; culpably careless; showing lack of

attention; as, disposed in negligent order." (Webster's Revised Unabridged Dict. (1913) p. 969.)

Additionally, no facts were alleged giving rise to any voluntary duty owed to FFLP by Commonwealth. It was not alleged that Commonwealth required a certified copy of FFLP's LP1 and a notarized signature of Ephraim, as general partner of FFLP, on an affidavit consenting to the transfer of the Property *for the exclusive benefit of FFLP*. (See *Giacometti*, *supra*, 187 Cal.App.4th 1133, 1139 ["Courts have found a duty owed to third parties where the sole purpose of the transaction was to benefit a third party".)

On the contrary, "[a] party who does not purchase title insurance may not rely on the title insurer to protect his or her interests or to disclose all detrimental information contained in the recorded files," and "a title insurer generally owes no duty to undertake a thorough search of the records or to disclose impediments to title" in the absence of a contract "to provide such a service." (*Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1193, 1194.) FFLP does not allege the existence of any such contract between itself and Commonwealth. (Cf, *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 802-805 [special relationship between lessee who operated restaurant on premises and contractor hired by the owner to renovate premises enabled lessee to seek recovery of lost income due to contractor's failure to complete the project with due diligence]; *Seely v. Seymour* (1987) 190 Cal.App.3d 844, 850-851, 855-856, 860-863 ["[U]nder the facts of this case," a duty of care to plaintiff real property owner was owed by the title insurance company not to record a purported lease, which was void on its face "and not entitled to recordation as a matter of law," having been signed solely by the purported lessee, a co-defendant who was "a regular customer" and for whom the insurer recorded the void instrument as an accommodation].) Also, no facts were alleged that, prior to close of escrow, Commonwealth knew or should have known that Keith had no authority to sign the grant deed or that the grant deed otherwise was a forgery, and thus, the deed of trust was infirm. (Cf. *In re Marriage of Cloney* (2001) 91 Cal.App.4th 429, 436, 440-441 [escrow officer's actual knowledge of material information during the transaction

imputed to principal on issue of principal's liability arising from the prior recorded real property interest].)

4. No Legally Cognizable Duty Owed by LTIC Pleaded

In its ninth cause of action for negligence, FFLP alleged it was "a 'de facto' party to the Escrow by virtue of the fact that the Escrow was for the purported transfer of [FFLP's] Property from [FFLP], as alleged Grantor, to Grove, as alleged Grantee. LTIC owed FFLP a duty of care, as "part and parcel" of the escrow and escrow instructions, to discover the impropriety of the fraudulent documents and to ascertain and confirm Ephraim's signature on the affidavit evidencing his consent to the Property transfer. LTIC owed FFLP a further "duty (a) to disclose to [FFLP the] material facts about the irregularities in the Fraudulent Grant Deed and the irregularities as to the identity and authority of the signer of the Fraudulent Grant Deed, and (b) to faithfully follow the Escrow and the Escrow instructions by stopping and preventing the Escrow from closing and the Fraudulent Property Transfer from taking place."

The mere allegation that a duty of care arose as "part and parcel" of the escrow and escrow instructions falls flat. The fatal flaw in FFLP's assertion of duty lies in the absence of any *specific* escrow instructions giving rise to the duties alleged. "An escrow holder, as a dual agent of the parties to the escrow, owes duties to the parties to the escrow. However, those duties are limited. The primary duty owed by an escrow holder is to strictly and faithfully perform the instructions given to it by the parties to the escrow. [Citation.]" (*Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 674; see also, *Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 923-924.)

5. No Leave to Amend Not Abuse

The subject complaint is devoid of any facts alleged to give rise to a duty of care to FFIC owed by Commonwealth or LTIC. FFIC fails to offer any facts which, if pleaded in yet another complaint, would cure such defects. The trial court therefore did not abuse its discretion by sustaining the demurrer of Commonwealth and that of LTIC without leave to amend.

CONCLUSION

In its second amended complaint, FFLP failed to allege facts sufficient to establish the requisite element of duty owed to FFLP by Commonwealth or LTIC. The absence of such duty is fatal to FFLP's asserted causes of action for negligence against these defendants. In the face of FFLP's failure to offer additional facts in support of a third amended complaint curing these defects, the trial court did not abuse its discretion in refusing give FFLP leave to amend.

DISPOSITION

The judgments are affirmed. Commonwealth and LTIC shall recover costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.