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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

KUROSH HASSID et al.,

Plaintiffs and Appellants,

v.

CARLOS JEREZ et al.,

Defendants and Respondents.

2d Civil No. B235959
(Super. Ct. No. 56-2011-00397946)
(Ventura County)

Appellants Kurosh Hassid and Farzad Shooshani (Buyers) negotiated to purchase a parcel of real property from Carlos Jerez and Mary Jerez (Sellers) and prepared a printed form agreement for the purchase. Although the purchase agreement was not signed, Buyers and Sellers signed escrow instructions for the transaction. Sellers refused to complete the sale and Buyers filed a complaint for specific performance.

Buyers appeal the judgment in favor of Sellers entered after the trial court sustained Sellers' demurrer to the complaint without leave to amend. The trial court ruled that the complaint failed to state a cause of action because it did not allege the formation of a binding contract.

We agree with Buyers' contention that the allegations of a negotiated purchase agreement combined with signed escrow instructions were sufficient to state a cause of action despite the failure of the parties to execute the purchase and sale agreement. We reverse.

FACTS AND PROCEDURAL HISTORY

Sellers owned a parcel of real property in Camarillo, California (Property) and entered into negotiations for the purchase of the Property by Buyers. The complaint alleges that Buyers and Sellers reached an agreement for the purchase and sale in May 2011, but that Sellers refused to consummate the transaction. Buyers filed a complaint seeking specific performance of the agreement in June 2011.

The complaint alleges that, on May 6, 2011, Sellers agreed to sell the Property to Buyers pursuant to the terms of a vacant land purchase agreement and joint escrow instructions (Purchase Agreement) which the parties had negotiated. The Purchase Agreement attached to the complaint is a printed form with the names of Buyers and Sellers, identification of the Property, and various terms and conditions filled in by hand. In particular, the Purchase Agreement states that the purchase price is \$975,000 with a \$50,000 down payment payable into escrow within three business days after "acceptance" of the Purchase Agreement and \$925,000 payable upon close of escrow. Each page of the Purchase Agreement is initialed by one of the Buyers and one of the Sellers, but neither the Buyers nor Sellers signed the Purchase Agreement on the printed form signature lines on its final page.

Although the Purchase Agreement form states that it also constitutes "Joint Escrow Instructions," the complaint further alleges that, on May 6, 2011, Buyers and Sellers signed separate escrow instructions opening an escrow at All Valley Escrow, Inc. "in furtherance of consummating the" purchase and sale of the Property (Escrow Instructions). The Escrow Instructions attached to the complaint are fully signed by Buyers and Sellers. The Escrow Instructions attached to the complaint expressly state that "Kurosh Hassid and Farzad Shooshani . . . agree to purchase from Carlos Jerez and Mary Jerez . . . the property set forth herein [the Property] per the terms, conditions, consideration and instructions hereinafter stated." The Escrow Instructions stated the purchase price and various requirements regarding documentation of the transaction and the conditions of closing.

The complaint alleges that, on May 9, 2011, Sellers formally requested the escrow holder to "void and rescind" the escrow and, thereafter, refused to consummate the purchase and sale.

Sellers filed a demurrer to the complaint alleging it failed to state a cause of action.¹ In the trial court, Sellers argued that the complaint was fatally defective because it was based on a nonbinding unsigned agreement. Buyers' opposition argued that the signed Escrow Instructions combined with the unsigned Purchase Agreement created a binding agreement which could be specifically enforced.

On July 26, 2011, the trial court conducted a hearing on the demurrer. A transcript of the demurrer hearing is not in the record on appeal, but the trial court issued a minute order on August 2, 2011, sustaining the demurrer without leave to amend. The minute order stated that "[e]scrow instructions can serve to satisfy the statute of frauds. They are, however, meant to carry out a signed contract. Here there is no signed contract. The unsigned contract clearly evidences the intent of the parties that both sides execute the contract before it is binding." Judgment was entered on August 22, 2011, and this appeal followed.

DISCUSSION

Buyers contend that the trial court erred in sustaining the demurrer because the unsigned Purchase Agreement together with the signed Escrow Instructions constituted the formation of a binding contract for the purchase and sale of the Property. Sellers respond by arguing that no contract was formed because the Purchase Agreement was not signed by any of its parties.

We independently review the judgment following the sustaining of a demurrer without leave to amend to determine whether the complaint states a cause of action under any legal theory. (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) We accept the truth of all properly pleaded factual allegations in the complaint, but do not assume the truth of contentions, deductions or conclusions of law. (*City of Dinuba v.*

¹ The demurrer also claimed the complaint was uncertain.

County of Tulare (2007) 41 Cal.4th 859, 865.) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Ibid.*) Further, we consider exhibits attached to the complaint and, if the facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence. (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447.)

We conclude that the complaint alleges sufficient facts to state a cause of action for specific performance of the Purchase Agreement. Although the Purchase Agreement was unsigned, the Escrow Instructions were signed by both Buyers and Sellers and expressly state that Buyers had agreed to purchase the Property. The Escrow Instructions also set forth the purchase price and certain other terms of sale. The two documents attached to the complaint as well as other allegations state facts showing the existence of all elements necessary for the formation of a binding and enforceable contract for the purchase and sale of the Property.

Under California law, the essential elements for the formation of a valid contract are capacity to contract, a lawful object, mutual consent of the parties to be bound, and sufficient consideration. (Civ. Code, § 1550; *Schaefer v. Williams* (1993) 15 Cal.App.4th 1243, 1246.) In an action for specific performance of a contract the complaint must allege facts showing that the consideration is adequate and it would not be inequitable to enforce it. (Civ. Code, § 3391.)

The only element disputed by the parties is whether there was consent. The consent of the parties to a contract must be free, mutual and communicated "by each to the other." (Civ. Code, § 1565.) "Mutual assent usually is manifested by an offer communicated to the offeree and an acceptance communicated to the offeror. . . . The determination of whether a particular communication constitutes an operative offer, rather than an inoperative step in the preliminary negotiation of a contract, depends upon all the surrounding circumstances." (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 270-271.) Consent may be shown by words or acts. (*Merced County Sheriff's Employee's Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 670.) In addition, parties may

agree to the essential terms of an agreement but intend that the agreement will become a binding contract only after a specified condition precedent is satisfied. For example, the parties may express their intent that an oral agreement will not become binding until it is reduced to writing or that a writing will not become binding until it is signed by the parties. (See *Converse v. Fong* (1984) 159 Cal.App.3d 86, 90-91; 1 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 1:19.)

The test is objective, namely whether a reasonable person would, from the conduct of the parties, conclude that there was mutual agreement. (*Hilleary v. Garvin* (1987) 193 Cal.App.3d 322, 327; see also *King v. Stanley* (1948) 32 Cal.2d 584, 588, disapproved on another point in *Patel v. Liebermensch* (2008) 45 Cal.4th 344, 349-350.) As stated in CACI No. 302, "[w]hen you examine whether the parties agreed to the terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement."

Here, there is no contention that, standing alone, the unsigned Purchase Agreement constitutes a binding and enforceable contract. Under the statute of frauds, a contract for the sale of real property is invalid unless the contract "or some note or memorandum thereof, [is] in writing and *subscribed by the party to be charged* or by the party's agent." (Civ. Code, § 1624, subd. (a), italics added; see *Sterling v. Taylor* (2007) 40 Cal.4th 757, 765.) The Purchase Agreement was detailed and unequivocal but no one signed it.

In addition to the initialed but unsigned Purchase Agreement, however, there are signed Escrow Instructions which expressly referred to the Purchase Agreement and set forth its essential terms. It is undisputed that the Escrow Instructions satisfy the statute of frauds in this case. A written memorandum of a contract for the sale of real property is sufficient if it identifies the buyer and seller, the property, and the price. (*King v. Stanley, supra*, 32 Cal.2d at p. 589; see also *Sterling v. Taylor, supra*, 40 Cal.4th at p. 766.) In addition, the act of formally opening an escrow and agreeing to provisions

which set forth the steps necessary to consummate the purchase and sale would support a finding by a trier of fact that there was mutual consent to the Purchase Agreement.

Escrow instructions are a customary and conventional means of consummating an underlying contract for the sale of real property and, although they do not supplant the agreement, escrow instructions may provide insight into, and evidence of, the parties' intent and understanding of the agreement. (*King v. Stanley, supra*, 32 Cal.2d at p. 589; *Katemis v. Westerlind* (1953) 120 Cal.App.2d 537, 542; *Petherbridge v. Prudential Sav. & Loan Assn.* (1978) 79 Cal.App.3d 509, 516; see also 3 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 6.6.)

Also, where an agreement is expressed through multiple writings, the writings documents must be construed collectively to ascertain the whole contract between the parties. (Civ. Code, § 1642.) Thus, where the terms of an executory agreement for the sale of real property are clarified and elucidated by the provisions contained in escrow instructions, both documents are to be considered together in determining the understanding of the contracting parties and their respective rights and obligations. (*Leiter v. Eltinge* (1966) 246 Cal.App.2d 306, 314; *Katemis v. Westerlind, supra*, 120 Cal.App.2d at p. 542.)

Applying the objective standard for mutual assent, allegations of the complaint and its exhibits establish a meeting of the minds of Buyers and Sellers for the purchase and sale of the Property. Accepting the allegations and provisions of the exhibits as true, the complaint states a cause of action for specific performance of the Purchase Agreement.

The judgment is reversed. The trial court is directed to vacate its order

sustaining the demurrer without leave to amend and to enter a new order overruling the demurrer. Appellant Buyers shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Henry Walsh, Judge
Superior Court County of Ventura

Morton Minikes for Appellants.

Law Offices of Jack A. Draper and Jack A. Draper II for Respondents.