Filed 3/26/12 The Oaks of Calabasas Homeowners Assn. v. Oblas CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE OAKS OF CALABASAS HOMEOWNERS ASSOCIATION, Plaintiff and Respondent, v. JEFFREY OBLAS, individually and as Trustee, etc., et al., Defendants and Appellants.	B227873 (Los Angeles County Super. Ct. No. LC081015)

APPEAL from an order of the Superior Court of Los Angeles County, Michael Latin, Judge. Reversed.

Bergman Law Group and Daniel A. Berman for Defendants and Appellants.

Law Offices of Bruce M. Lorman and Bruce M. Lorman; Law Offices of Ernest Allen Wish and Ernest Wish for Plaintiff and Respondent.

INTRODUCTION

This is an appeal from an order of dismissal after the trial court sustained the cross-defendants' demurrer to a third amended cross-complaint, finding the cross-complainants (purchasers of a lot within a planned community) had failed to allege a joint venture involving the cross-defendants and therefore had failed to state their causes of action against these cross-defendants. Because we conclude the issue of whether the cross-defendants' relationship amounted to a joint venture should not have been resolved at the demurrer stage, we find the trial court erred in sustaining the demurrer without leave to amend and reverse.

FACTUAL AND PROCEDURAL SUMMARY

According to the allegations of the third amended cross-complaint, in May 2004, Jeffrey Oblas and Heidi Adams entered into a real property purchase agreement with cross-defendant New Millennium Homes LLC (New Millennium) for the purchase of a lot (located at 3850 Prado del Trigo) within a planned-development community known as The Oaks of Calabasas (The Oaks).[1] At the time, there was no residence, no exterior landscaping and no pool at the location, but the purchase included New Millennium's covenant to build a residence upon the lot as part of The Oaks. As a condition precedent for being permitted to enter into a land sale purchase contract with New Millennium for a lot within The Oaks, a potential purchaser including Oblas had to apply for and be approved for a new mortgage loan with Wells Fargo Bank; while purchasers were not required to choose Wells Fargo as their lender, New Millennium and Wells Fargo offered the incentive of a $10,000 discount in closing costs on the land sale purchase agreement if the purchaser did choose Wells Fargo as their lender. Based on the $10,000 incentive, Oblas chose Wells Fargo as his mortgage lender.

---

[1] According to the third amended cross-complaint, Oblas and Adams are married and are trustees of cross-complainant Cabo Investment Trust. We include Adams and the Cabo Investment Trust in our further references to Oblas.

No real property purchaser within The Oaks was permitted to commence landscape and pool installation on a lot until after escrow closed on the real property purchase without approval from cross-defendant, The Oaks of Calabasas Homeowners Association (the Homeowners Association).[2] At the time, because New Millennium owned the majority of the lots within The Oaks, New Millennium controlled the Homeowners Association and therefore could cause the approval of the agreement at issue in the cross-complaint. On or about August 2, 2004, New Millennium, cross-defendant Harper Pools and Landscaping, Inc. (Harper Pools) and the Homeowners Association entered into an agreement ("partially in writing and partially orally") to combine their property, money, efforts, skill or knowledge in a common undertaking or business, i.e., providing purchasers of lots within The Oaks with the ability to commence outside landscaping and/or pool installations prior to closing escrow.

As part of their agreement, Harper Pools would act as contractor with respect to exterior improvements for homes sold by New Millennium at The Oaks; New Millennium would advise potential purchasers (including Oblas) in writing that Harper Pools was the preferred contractor and New Millennium was responsible for approving the lender to finance the work; and the Homeowners Association would review plans submitted for the work to be performed and would provide the approvals necessary for such outside landscaping or pools. The ability to control the Homeowners Association's construction approval decisions prior to close of escrow was reasonably necessary to carry out the purposes of the agreement for the business undertaking, thus binding the Homeowners Association to the joint venture although the Association was not disclosed

---

[2] This action commenced with the Homeowners Association's filing of a complaint against Oblas for breach of covenants and other causes of action relating to the landscaping and pool construction on his property.

in the agreement alleged. (See e.g., *Engineering Service Corp. v. Longridge Ins. Co.* (1957) 153 Cal.App.2d 404, 414-415.)

New Millennium, Harper and the Homeowners Association agreed to share the profits from their business undertaking by New Millennium and Harper Pools each receiving a percentage from monies paid by purchasers of lots for work performed by Harper Pools and by the Homeowners Association receiving the benefits of (1) having work performed quicker (prior to escrow closings) thus receiving its fees from potential purchasers for such approvals earlier than it otherwise would have received them and (2) having The Oaks landscaped sooner thus beautifying the development for its members and potential buyers and thereby increasing its earnings, including receiving monies earlier than it would have without this business undertaking and increasing its ability to operate.

The parties to this business undertaking either shared joint control of the management of such business undertaking or otherwise agreed to delegate such control of the management of such business to one or more of the parties to this business undertaking, such delegation of certain aspects of control did not affect the existence of the business undertaking, and this business undertaking is alleged to constitute a joint venture. (See e.g., *Scottsdale Ins. Co. v. Essex Ins. Co.* (2002) 98 Cal.App.4th 86.)

In furtherance of their joint venture, on or about August 3, 2004, Louis J. Malone, New Millennium's chief executive officer, sent a letter to Oblas, advising him that New Millennium was very pleased to inform him (and other property owners within The Oaks) that New Millennium "had entered into an association" with Harper Pools. Malone represented that should the purchaser choose to hire Harper Pools to install landscaping and/or a pool, the purchaser would have permission to begin such improvements prior to close of escrow. (This letter was attached as Exhibit A to the third amended cross-complaint.) The August 3, 2004 letter made it clear that the option to begin landscaping and pool installation prior to close of escrow was *only* available if purchasers hired

Harper Pools and only if Wells Fargo provided the financing. Further, this option was not available if Oblas chose any other contractor or mortgage lender to perform the work. Malone also stated that should Oblas hire Harper Pools, Oblas would be able to significantly reduce the time for the project completion and additional financing would be available through Wells Fargo for completion of such work.

On or about October 8, 2004, Billy Harper sent a letter to Oblas, in which he represented he was the president of Harper Pools and discussed the "innovative landscape program" New Millennium and Harper Pools had created. Harper represented that should Oblas hire Harper Pools through this program, (1) Harper Pools would be able to assist in "significantly speeding up" the design review and preliminary and final approval process for landscaping and pool construction necessary to be obtained from the Homeowners Association and the City of Calabasas; (2) such process and construction could commence during construction of Oblas's home and prior to close of escrow; (3) Oblas could have the option of changing their driveway without incurring the demolition costs otherwise associated with changing such design; and (4) "only" through this program, Oblas would have the option to obtain further financing for their landscaping and pool installation as part of their home purchase financing transaction with Wells Fargo.

Thereafter, Harper orally represented he had a "direct line" to obtaining final approval of plans and construction from the Homeowners Association, including that said plans and construction would be given the necessary final approval based at least in part on the association with New Millennium, New Millennium's majority interest in the Homeowners Association and Harper's representation of personal relationships with the Association's architectural committee members.

As joint venturers, Oblas alleged, cross-defendants New Millennium and Harper Pools (among others) are the agents of one another in all contracts reasonably necessary to carry out the purpose of the joint venture alleged (see e.g., *Engineering Service Corp.*

v. Longridge Inv. Co. (1957) 153 Cal.App.2d 404, 411; *Smalley v. Baker* (1968) 262 Cal.App.2d 824, 837) and as such are jointly and severally liable for the acts of each individual cross-defendant in carrying out the purpose of the joint venture. (See e.g., *Hupfeld v. Wadley* (1948) 89 Cal.App.2d 171, 175 (negligence); *Grant v. Weatherholt* (1954) 123 Cal.App.2d 34, 45 (fraud).)

Based on the cross-defendants' representations of the advantages of working with the principals of the joint venture and in justifiable reliance upon such advantages and representations, Oblas alleged, he elected to hire Harper Pools instead of other contractors he was considering for landscaping and pool installation. On or about February 8, 2005, Oblas entered into a contract with Harper Pools for the landscaping and pool installation work to be completed at his property. (This contract is attached to the third amended cross-complaint as Exhibit B.)

On or before April 26, 2005, Harper Pools submitted plans to the Homeowners Association for landscaping and pool installation at Oblas's property, and on behalf of the Homeowners Association, Judy Palmer preliminarily approved Harper Pools' proposed plans. For construction to be completed, final approval by both the Homeowners Association and the City of Calabasas was required. In reliance on such approval of Harper Pools' plans, construction began, Oblas incurred costs and all necessary final approvals from the City of Calabasas were obtained. Pursuant to cross-defendants' representations, Oblas received further financing for the landscaping and pool installation. On or about May 25, 2005, just prior to close of escrow, New Millennium, Harper Pools and Oblas agreed the sum of $286,651 would be withheld in escrow from which payments were made for the landscaping and pool installation. On or about May 27, 2005, escrow closed and Oblas became the owner of the Del Trigo property.

After Harper Pools finished the majority of the landscaping and pool installation and although final approval had been given by the City of Calabasas, New Millennium and the Homeowners Association have withheld and refuse to provide final approval of

plans and construction for the landscaping and construction at Oblas's property, including as provided by the Association's CC&Rs, since at least August 3, 2006, despite the construction's completion by the Association's joint venturer Harper Pools.

During the course of construction, Harper Pools did not satisfactorily complete all work necessary to the contract entered on February 8, 2005, and did not finish the work, to Oblas's damage. Cross-defendants' representations were designed to induce Oblas to use the services of each principal of the joint venture to his detriment, including the damage to his title. The written representations made in the letters sent to Oblas and the oral representations by Harper, including that if Harper Pools was retained to perform the landscaping and pool installation, the Homeowners Association would approve the plans were false, the cross-defendants knew the representations were false when made and were designed to materially mislead Oblas into retaining the services of Harper Pools, and Oblas justifiably relied on these representations to his detriment. Since Harper Pools is a member of the alleged joint venture, Oblas alleged, all cross-defendants are jointly and severally liable for Oblas's damages, including his inability to resell the property due to the cross-defendants' actions.

As relevant, Oblas alleged causes of action against New Millennium and Malone for breach of contract, fraud, negligent misrepresentation, conspiracy and slander of title. New Millennium (among other cross-defendants) filed a demurrer, arguing that Oblas had failed to allege a joint venture and otherwise failed to state any cause of action against New Millennium (or Malone).[3] (This appeal is proceeding as to New Millennium Homes and Malone only.) The trial court sustained the demurrer without leave to amend and dismissed Oblas's third amended cross-complaint as to New Millennium and Malone.

---

[3] In his opening brief, Oblas notes the demurrer identifies only New Millennium as the moving party but says his counsel recalls an agreement the demurrer would also "include" Malone and "does not dispute" Malone's inclusion in New Millennium's demurrer.

More particularly, the trial court determined the joint venture allegations were inadequate, and "[w]ithout adequate pleading of joint venture liability," the third-amended cross-complaint fails. As to the first cause of action for breach of contract, the trial court found insufficient allegations of joint venture liability and New Millennium was not a signatory to the contract at issue. The second and third causes of action for fraud and negligent misrepresentation were also found to lack specificity. The trial court found the fourth cause of action for conspiracy had not been stated because the underlying fraud cause of action failed. The fifth cause of action for slander of title was deficient for failure to allege publication of any disparaging statements.

Oblas appeals.

DISCUSSION

"The standard principles for reviewing the sufficiency of a complaint against a general demurrer are well established. We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125 [271 Cal.Rptr. 146, 793 P.2d 479].) We also disregard allegations which are contrary to law or to facts which may be judicially noticed (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955 [199 Cal.Rptr. 789]) or which are contradicted by the express terms of an exhibit incorporated into the complaint. (*Alphonzo E. Bell Corp. v. Bell etc. Synd*. (1941) 46 Cal.App.2d 684, 691 [116 P.2d 786].) We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context, to determine whether the complaint states facts sufficient to constitute a cause of action. (*Pruyn v. Agricultural Ins. Co*. (1995) 36 Cal.App.4th 500, 513 [42 Cal.Rptr. 2d 295].)" (*Breneric Associates v. City of Del Mar* (1998) 69 Cal.App.4th 166, 180.)

According to Oblas, he adequately alleged a joint venture in the third amended cross-complaint so to the extent the demurrer was sustained as to all causes of action on this ground, the trial court erred. Under the authorities cited by Oblas, we agree.

Cooperative contractual arrangements may be loosely termed joint ventures. (*Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 Cal.2d 751, 764-765 ["the mode of participating in the fruits of the undertaking may be left to the agreement of the parties"]; and see 9 Witkin, Summary of Cal. Law (10th ed. 2005) Partnership, § 11, pp. 586-587 [and authorities cited therein].) More importantly, the existence of a joint venture is a question of fact and the parties' conduct may create a joint venture even in the case of express declarations to the contrary. (See *April Enterprises v. KTTV* (1983) 147 Cal.App.3d 805, 820, citing *Universal Sales Corp. v. California Press Mfg. Co., supra,* 20 Cal.2d at p. 765.) It follows that this issue was improperly resolved at the pleading stage. (*Kaljian v. Menezes* (1995) 36 Cal.App.4th 573, 586 ["The existence or nonexistence of a joint venture is a fact question for resolution by the jury"].)

Further, Oblas says, each cause of action against New Millennium was adequately alleged and should have withstood demurrer. In addition to arguing that the entire third amended cross-complaint is deficient for failure to adequately allege a joint venture, New Millennium says Oblas failed to state any cause of action against New Millennium. As to the first cause of action for breach of contract, however, New Millennium's argument is that New Millennium was not a party to the contract and Oblas failed to allege joint venture liability. Because we find the factual question of joint venture liability was improperly resolved on demurrer, it follows that New Millennium's challenge to the first cause of action fails as well.

Next, New Millennium argues the second and third causes of action for fraud and negligent misrepresentation fail for lack of specificity. Again, we disagree.

"The basic rules as to the need to plead fraud with specificity were recently recapitulated by the court in *Citizens of Humanity, LLC v. Costco Wholesale Corp*. (2009) 171 Cal.App.4th 1, 20 [89 Cal. Rptr. 3d 455]: '"In California, fraud must be pled specifically; general and conclusory allegations do not suffice." . . . This requirement serves two purposes. First, it gives the defendant notice of the definite charges to be met.

Second, the allegations "should be sufficiently specific that the court can weed out nonmeritorious actions on the basis of the pleadings. Thus the pleading should be sufficient '"to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud."'" . . . Thus, *a plaintiff must plead facts which show how, when, where, to whom, and by what means the representations were made*. . . . When the defendant is a corporate defendant, the plaintiff must further allege the *names of the persons who made the representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written*. . . . There are certain exceptions to the particularity requirement. "Less specificity is required when 'it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy.'"'" (Italics added; citations omitted.)" (*Wald v. TruSpeed Motorcars, LLC* (2010) 184 Cal.App.4th 378, 393-394.)

"Tested under these rules, the [pleading] passes muster." (*Wald v. TruSpeed Motorcars LLC, supra,* 184 Cal.App.4th at p. 394.) According to the third amended cross-complaint, the allegedly fraudulent and negligent misrepresentations were set forth in the August 2004 correspondence from New Millennium (by its CEO Malone) to Oblas and from Harper to New Millennium (through Malone) as well as oral statements Harper made to Oblas, and these misrepresentations by members of a joint venture included representations that if Oblas hired Harper, Harper would complete the work, New Millennium would approve Harper's work, and New Millennium's majority interest in the Homeowners Association and Harper's personal relationships with the Homeowners Association's architectural committee members meant the Homeowners Association would approve Harper's work. (*Ibid.*; and see Civ. Code, § 1710 [deceit defined].)

Next, New Millennium argues, the fourth cause of action for conspiracy fails because conspiracy is not a separate cause of action; rather, it is a theory of vicarious liability under which certain defendants may be held liable for torts committed by others.

According to New Millennium, the fourth cause of action must fail because the underlying fraud cause of action fails and because "There was not the required animus or plan to injure anyone—just an attempt to pass benefits onto the buyers of new home construction in the form of favorable financing and favorable timing of commencement of improvements to the Property prior to the close of escrow—nothing more!" As we have explained, the demurrer to the fraud cause of action for lack of specificity was not properly sustained, and the issue of New Millennium's intent is not properly resolved at the pleading stage.

Finally, New Millennium says the fifth cause of action for slander of title was not stated because the Homeowners Association (and not New Millennium) made the allegedly disparaging statements that the Homeowners Association "will not give final approval and . . . there are problems with the slope caused by . . . joint venture, Harper Pools" and these allegations do not state a claim for slander of title no matter who made them.

As stated in *Seeley v. Seymour* (1987) 190 Cal.App.3d 844, "California has adopted the definition of the tort [of slander of title] set forth in section 624 of the Restatement of Torts, which provides: 'One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land . . . under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.' [Citations.] The elements of the tort are (1) publication, (2) absence of justification, (3) falsity and (4) direct pecuniary loss. (*Howard v. Schaniel*[(1980)] 113 Cal.App.3d [256,] 264; Rest.2d Torts, § 623A.) Nowhere does a California decision require that the published matter create a legal 'cloud' upon plaintiff's title to constitute a disparagement. Indeed, the tort may be committed through the use of oral statements [citation] or signs [citation], neither of which involve any recordation whatsoever. [¶] '[Protection] from injury to the

salability of property is the thrust of the tort.' (*Howard v. Schaniel, supra,* 113 Cal.App.3d at p. 264) Therefore, the key to whether the defendant's conduct is actionable is not whether he has succeeded in casting a legal cloud on the plaintiff's title, but whether he could reasonably foresee that 'the conduct of a third person as purchaser or lessee [of the property] *might be determined thereby*. . . .' (Rest., Torts, § 624, italics added.)[ ]" (*Id.* at pp. 857-858, additional citations and footnote omitted.)

Because the question of whether the statements attributed to New Millennium's alleged joint venturer "might chill the enthusiasm of any prospective purchaser of [Oblas's] property" was a factual issue (*Seeley v. Seymour, supra,* 190 Cal.App.3d at p. 858), the demurrer to this cause of action should have been overruled. (*Ibid.* ["Whether a reasonable purchaser would alter his conduct based upon [the defendant's] memorandum was a factual issue properly left to the jury to resolve . . . ."].)

According to New Millennium (and Malone), because Oblas conceded Malone was included as a party to the demurrer but failed to address Malone's individual liability, Oblas has abandoned any distinct claim against Malone. We disagree.

As Oblas stated in his opening brief, the demurrer to Oblas's third amended cross-complaint identifies New Millennium as the only moving party but Oblas acknowledges an agreement that Malone would be "included" in New Millennium's demurrer. Not surprisingly, however, neither New Millennium's moving papers nor its reply raised any argument as to Malone's individual liability. Because we conclude the trial court erred in sustaining New Millennium's demurrer to Oblas's third amended cross-complaint, to the extent Malone was "included" in that demurrer, the same conclusion applies to Malone as well.

DISPOSITION

The order sustaining New Millennium's demurrer to Oblas's third amended cross-complaint without leave to amend and dismissing the third-amended cross-complaint as to New Millennium and Malone is reversed and the matter is remanded to the trial court

with directions to enter a new order overruling the demurrer as to New Millennium (and Malone). Oblas is entitled to his costs of appeal.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**