Filed 2/19/13 Sands v. Philly 57 CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOSEPH A. SANDS, JR., Plaintiff and Appellant, v. PHILLY 57, INC., et al., Defendants and Respondents.	B237165 (Los Angeles County Super. Ct. No. LC088242)

APPEAL from an order of the Superior Court of Los Angeles, Frank J. Johnson, Judge. Reversed and remanded with directions.

Rossi, Hamerslough, Reischl & Chuck, Eric A. Gravink, Ronald R. Rossi and Richard B. Gullen for Plaintiff and Appellant.

Manning & Kass, Ellrod, Ramirez, Trester LLP, Rinat Klier Erlich and Candace E. Kallberg; Rosen ⌖ Saba, Ryan D. Saba and Elizabeth L. Bradley for Defendants and Respondents.

In the underlying action, respondents sought summary judgment on appellant Joseph A. Sands's complaint, contending that he lacked standing to assert claims against them. The trial court denied Sands's request for leave to amend his complaint to cure the deficiency regarding standing, and granted summary judgment. We conclude that the trial court erred in denying leave to amend, and thus reverse the grant of summary judgment.

RELEVANT PROCEDURAL BACKGROUND

A. *Complaint*

On September 30, 2009, Sands filed a complaint against respondents Enrique Alfonso Wong, Shay C. Shepston, Philly 57, Inc. d.b.a. Re/Max Commercial (Re/Max), and National Equity Advisors, Inc., (NEA), containing claims for breach of fiduciary duty, constructive fraud, and negligence.[1] The complaint alleged the following facts: In 2006, Re/Max "and/or" NEA employed Wong and Shepston as real estate agents or brokers. Sands became interested in investing in commercial property, and retained Wong, who represented himself as an expert in commercial properties. Sands told Wong that because he had no experience with commercial real estate, he relied on Wong to "guide him through the process."

The complaint further alleged that Wong identified a parcel of commercial property in Lakewood, Colorado as an "excellent investment opportunity." Wong also introduced Shepston to Sands as someone who would be helpful in obtaining the property. Both Wong and Shepston strongly recommended that Sands buy it.

---

[1] The complaint erroneously identified Re/Max as "Boulevard Brokerage Group, Inc. d.b.a. Re/Max Commercial."

Relying on their advice, Sands offered $1,400,000 for the property, which was accepted. During the escrow period, Wong and Shepston urged Sands to close quickly because the property was a "'great deal.'" After Sands asked them to obtain rent rolls or estoppel certificates to confirm the rental income from the property, they told him that "all was in good order and the rental income supported the purchase price." They also advised him that he need not have the property appraised or inspected, and that he should remove contingencies to expedite the close of escrow, which occurred on or about July 20, 2006.

The complaint further alleged that after the purchase, the property's rental income fell short of the estimate that Wong and Shepston had provided. In October 2006, Wong and Shepston told Sands that the property's rental income did not match the estoppel certificates obtained during the sales transaction. They also advised Sands not to seek the assistance of an attorney because they could resolve the matter in a less costly and less complicated way. As a result, Sands did not consult an attorney and instead, permitted Wong and Shepston to negotiate a settlement with the seller. Sands obtained $13,200 under the settlement and executed a mutual release of claims.

The complaint further alleged that in July 2007, Sands told Wong and Shepston that he wanted to sell the property because its rental income fell short of the estimate provided when he bought it. They urged him to fund repairs to the property in order to attract new tenants willing to pay higher rents. Relying on their advice, Sands retained the property and invested additional funds in it, but the improvements to the property did not increase its rental income. In September 2008, Sands listed the property for sale. During the following months, he received

only a single offer of $840,000. Had the building been sold in July 2007, Sands alleged, he would have received $1,400,000 or more for it.

B. *Respondents' Motion for Summary Judgment*

On April 15, 2011, respondents filed a motion for summary judgment, contending that Sands lacked standing to assert the claims contained in his complaint.[2] Respondents argued that the proper plaintiff was JS Real Estate Lakewood, L.L.C., a California limited liability company (the LLC). They submitted evidence supporting the following version of the underlying facts: Aside from Sands, the members of the LLC were Karen and David Cuifo, who are Sands's sister and brother-in-law. On July 18, 2006, the LLC formally authorized Sands to buy the property in his capacity as the LLC's manager. At all relevant times, the LLC owned the property and held its title. After a dispute arose between the LLC and the property's seller, they entered into a settlement under which the seller paid $13,200 to the LLC. On or about March 30, 2007, the LLC and the seller executed a mutual release of claims pursuant to the settlement. Later, the LLC sold the property.[3]

---

[2] In ruling on the summary judgment motion, the trial court overruled the parties' evidentiary objections to the adversarial showings. As the parties do not challenge these rulings on appeal, our analysis encompasses the parties' showings in their entirety. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1182, fn. 5 [appellant's failure to address trial court's evidentiary rulings in connection with summary judgment forfeited contentions of error regarding rulings].)

[3] Respondents' motion for summary judgment asserted that after the purchase of the property but before its sale, the LLC transferred the property to a similarly named limited liability company formed in Colorado. This does not affect our analysis, as Sands's proposed amended complaint asserted the dissolution of two similarly named LLCs in California and Colorado and alleged that he, as manager, had "distributed and assigned" the entities' assets, "including the claims and causes of action herein" to himself.

Sands's opposition to the motion, filed June 10, 2011, offered two independent bases for his standing to assert the claim. He argued that although the LLC held the legal title to the property, he retained the "beneficial interest" in the property and the LLC. In addition, he maintained that he was the assignee of the LLC's rights and interests in the property. Regarding the latter contention, Sands requested leave to amend the complaint to allege that he was the successor and assignee of the LLC's rights and interest, including the claims asserted in the complaint.

In support of the opposition, Sands provided a declaration stating that in 2006, he hired respondents as his real estate agents and brokers to advise him regarding the purchase of commercial property. After he decided to buy the property, he formed the LLC shortly before the close of escrow. Although the LLC held the legal title to the property, he funded the purchase from his own sources. Thereafter, he controlled the LLC and the property and "retained all beneficial ownership of the funds, profits, and interest in the LLC." Before the sale of the property in August 2009, Sands caused the LLC to be dissolved. When the LLC was dissolved, "all of its remaining assets were distributed . . . and assigned to [him]."

On June 30, 2011, the date set for the hearing on the summary judgment motion, the trial court stated that Sands appeared to be the "wrong plaintiff." The court nonetheless decided to defer its ruling on the motion until it examined Sands's proposed amendments to the complaint. The court stated that it "would be inclined to treat th[e] motion for summary judgment as a motion for a judgment on the pleadings, but not until [it saw] a proposed amended pleading in the name of

the proper plaintiff . . . ." The court thus directed Sands to file a motion for leave to amend the complaint and continued the hearing on the summary judgment.

C. *Motion for Leave to Amend the Complaint*

On July 5, 2011, Sands formally requested leave to amend the complaint to add allegations (1) that he was the manager of the LLC, (2) that the LLC had been dissolved, and (3) that "[o]n dissolution, [Sands], as manager, distributed and assigned the assets, including the claims and causes of action [in the complaint], to Sands, the individual." Accompanying the request was a declaration from Sands's counsel, Eric A. Gravink, who observed that Wong, Shepston and NEA did not raise lack of standing as a defense in their answers. Gravink further stated that although Re/Max's answer identified lack of standing as a defense, Re/Max provided no facts to support the defense during discovery.

According to Gravink, Sands's standing was first raised during Sands's deposition in March 2011, shortly before respondents filed their summary judgment motion. During a break in the deposition, Christopher W. P. Overton, respondents' counsel, identified Sands's lack of standing as the basis for a forthcoming motion for summary judgment. Gravink replied that the LLC had been dissolved and Sands had received all of its assets. When Gravink proposed an amendment to the complaint, Overton suggested that any such amendment might be time-barred under the governing statutes of limitation.

Respondents' opposition to Sands's request was supported by a declaration from Overton, who stated that on March 25, 2011, he told Gravink that respondents planned to file a summary judgment motion based on Sands's lack of standing. In response, Gravink referred to a statute -- according to Overton,

perhaps a Corporations Code section -- that purportedly established Sands's standing to sue.

D. *Trial Court's Rulings*

On August 12, 2011, the trial court conducted a hearing on the pending request for leave to amend and motion for summary judgment. In denying leave to amend, the court stated that its ruling was based not on Sands's delay in seeking leave to amend, but on "an attempt . . . to allege something that is utterly inconsistent with prior pleadings." Noting that a limited liability company is "not something [Sands] can turn on and off at will," the court stated: "[T]he Court has the discretion to make a finding as to . . . credibility, and frankly . . . I find it very difficult to believe that this assignment ever occurred other than in the mind of [Sands] himself . . . . [¶] There's no indication of when this alleged assignment occurred, . . . what the opinion is of the other parties to this LLC, where it occurred. It's all just this notion that, somewhere in the distant past, an assignment occurred. Frankly, I don't find that to be credible at all."

In ruling, the court relied on several considerations. The court reasoned that it was unlikely that the assignment would have been omitted from the complaint if it actually occurred, stating: "I think that . . . the LLC needed to be named as the plaintiff in this case [and] that, if there was an assignment, that fact would have been made known to everybody . . . in the complaint that was filed . . . . [¶] It's inconceivable to me it would not be in the Complaint." On this matter, the court stated that Gravink's declaration was "totally lacking" in explaining why the assignment had not been alleged in the complaint, remarking that Gravink had not stated that he had forgotten the assignment. While acknowledging that a writing

was not necessary for the assignment, the court noted there was no evidence of a written assignment; in addition, it observed that none of the other LLC members had provided a declaration supporting the existence of the assignment. The court concluded: "That [the assignment] would suddenly come up after two years of litigation, [that] this miraculous assignment occurred that nobody witnessed and there's no writing memorializing it, I find that difficult to believe."

Turning to the motion for summary judgment, the trial court concluded there were no triable issues whether Sands had standing to assert the claims in the complaint. On October 6, 2011, judgment was entered in favor of respondents and against Sands. This appeal followed.

DISCUSSION

Sands challenges the grant of summary judgment, and contends that the trial court erroneously denied his request for leave to amend his complaint. For the reasons explained below, we agree.[4]

---

[4] At the threshold of our inquiry, we note that NEA contends it is not a proper party to this appeal because Sands failed to list it as a respondent on the civil case information sheet that he filed in connection with the appeal. We reject this contention. Our jurisdiction over the appeal is determined by Sands's notice of appeal (*In re Marriage of Varner* (1998) 68 Cal.App.4th 932, 936), which is construed liberally in favor of its sufficiency (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624). For this reason, our jurisdiction encompasses the entirety of a judgment identified in the notice, unless "there is a clear intention to appeal from only part of the judgment . . . ." (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 47.) Here, Sands's notice states that the appeal is taken from the judgment following summary judgment and the related ruling on his request for leave to amend the complaint. As the notice does not exempt the judgment and ruling insofar as they are in favor of NEA, NEA is properly a party to this appeal.

NEA also suggests that Sands abandoned his appeal against it by omitting it from the civil case information sheet. We disagree. The ordinary procedure by which an

(Fn. continued on next page.)

A. *Governing Principles*

Sands's contention requires us to examine the intertwined rulings on the summary judgment motion and request for leave to amend. Generally, "[s]ummary judgment is proper if there is no triable issue of material fact and the moving party is entitled to summary judgment as a matter of law. (Code Civ. Proc., § 437c.)" (*National Auto. & Cas. Ins. Co. v. Underwood* (1992) 9 Cal.App.4th 31, 36.) In moving for summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element X." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.) We review a grant of summary judgment de novo.[5] (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819.)

Here, respondents' motion for summary judgment challenged Sands's standing to assert the claims in the complaint. "Standing is a jurisdictional issue that . . . must be established in some appropriate manner." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232, disapproved on another ground in *Save the Plastic Bag Coalition v. City of*

---

appellant may abandon an appeal requires a formal stipulation or request, which Sands has never submitted (Cal. Rules of Court, rules 8.244(b), (c)). Nor can Sands's failure to mention NEA in his information statement be regarded as an abandonment, as the function of the information statement is to alert the Court of Appeal regarding potential defects in the appeal and otherwise facilitate the Court of Appeal's processing of the appeal (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 3:162.2, pp. 3-66 to 3-67). As the information statement has no bearing on NEA's status as respondent, Sands's error did not work an abandonment.

5 "'Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.]'" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid*.)

Manhattan Beach (2011) 52 Cal.4th 155, 169-170.) Only real parties in interest have standing to prosecute actions. (*Iglesia Evangelica Latina, Inc. v. Southern Pacific Latin American Dist. of the Assemblies of God* (2009) 173 Cal.App.4th 420, 445.) "'Generally, "the person possessing the right sued upon by reason of the substantive law is the real party in interest." [Citations.]' [Citation.] To have standing, a party must be beneficially interested in the controversy, and have 'some special interest to be served or some particular right to be preserved or protected.' [Citation.]" (*Id*. at p. 445.) Lack of standing is a jurisdictional defect that mandates dismissal of an action, and thus can be raised for the first time at any stage in the action. (*Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 501, 503.)

Because the plaintiff typically discloses the basis for his or her standing in the complaint (*Clifford S. v. Superior Court* (1995) 38 Cal.App.4th 747, 751), the existence of standing is usually raised by demurrer (*Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 481). However, respondents' challenge to Sands's standing required a motion for summary judgment because the purported defect does not appear on the face of the complaint. The crux of the challenge is that the LLC alone had standing to assert the claims in the complaint, as the LLC -- and not Sands -- owned the property during the pertinent period. As the complaint's allegations suggest that Sands owned the property throughout this period, respondents could attack the theory of standing contained in the complaint only by presenting evidence establishing the LLC's ownership of the property.

In opposition to respondents' summary judgment motion, Sands submitted evidence in support of two distinct theories of standing. In an effort to show the existence of triable issues regarding the theory of standing contained in the complaint, Sands offered evidence that he retained the "beneficial interest" in the LLC and the property during the pertinent period. In addition, he presented

evidence supporting a theory of standing not alleged in the complaint, namely, that he was the assignee of the LLC's claims regarding the property.

To avoid summary judgment on the basis of the second theory, Sands was obliged to seek leave to amend the complaint to allege the assignment. Generally, in the context of a motion for summary judgment, the function of the complaint is "to delimit the scope of the issues." (*Orange County Air Pollution Control Dist. v. Superior Court* (1972) 27 Cal.App.3d 109, 113.) For this reason, when the complaint fails to allege a crucial requirement of a cause of action, the moving party need not address it in seeking summary judgment. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381-382.) Thus, "[i]f the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-1265.) Ordinarily, leave to amend should be requested before the hearing on the summary judgment motion. (*Id*. at p. 1265.)

When a motion for summary judgment discloses a defect in the complaint, Code of Civil Procedure section 473 authorizes the trial court to permit an amendment to the complaint "upon any terms as may be just." (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1486.) The statute "has received a very liberal interpretation by the courts of this state. [Citations.]" (*Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 19.) However, under the "'sham pleading doctrine,'" the trial court may disregard amendments that omit harmful allegations in the original complaint or add allegations inconsistent with it. (*State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 412.) In addition, leave to amend is properly denied when the defendant will suffer prejudice from the proposed amendments. (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761 (*Atkinson*).)

B. *Standing based on "Beneficial Interest"*

We begin by examining whether Sands established a triable issue of fact regarding the first theory of standing offered in opposition to summary judgment. Under this theory, Sands held rights to the property throughout the pertinent period because he held the "beneficial interest" in the LLC and the property. As explained below, the theory fails as a matter of law.

The record unequivocally shows that the LLC was created under the provisions of the Corporations Code governing limited liability companies (Corp. Code, § 17000 et seq.). Generally, "'[a] limited liability company is a hybrid business entity . . . consisting of at least two 'members' [citation] who own membership interests [citation]. The company has a legal existence separate from its members. Its form provides members with limited liability to the same extent enjoyed by corporate shareholders [citation], but permits the members to actively participate in the management and control of the company [citation].'" (*PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 963, quoting 9 Witkin, Summary of Cal. Law (2001 supp.) Corporations, § 43A, p. 346.) Ordinarily, the company's form also bars members from asserting claims as individuals against third parties based on injury to the company's interests. (*PacLink Communications Internat., Inc. v. Superior Court*, *supra*, 90 Cal.App.4th at p. 966.)

Regarding the formation of the LLC, Sands stated in his declaration: "Shortly before the close of escrow [regarding the property], I formed a limited liability company for the purpose of holding legal title to the [property]. I believed it was necessary for an LLC to hold legal title in order to conform to the guidelines and restrictions regarding investment of my self-directed IRA retirement funds. The acquisition of the [property] was funded by my self-directed IRA and a loan

personally guaranteed by me. While the LLC held legal title upon the close of escrow, I retained all beneficial ownership of the funds, profits, and interest in the LLC. At all times, I controlled all aspects of the LLC and the [p]roperty."

Sands maintains his declaration raises triable issues whether he retained the beneficial interest in the property, for purposes of establishing his standing to assert claims as an individual regarding the property. In our view, he is mistaken. To begin, the fact that an individual's interest in property may be characterized as a "beneficial interest" does not, by itself, establish that the individual has standing to assert claims against third parties based on that interest. For example, although the term "beneficial interest" is commonly used to designate the interest of a beneficiary in an express trust (*Papineau v. Security-First Nat. Bank* (1941) 45 Cal.App.2d 690, 693), absent extraordinary circumstances, only the trustee may assert claims against third parties arising out of the express trust. (*Wolf v. Mitchell, Silberberg & Knupp* (1999) 76 Cal.App.4th 1030, 1036; *Powers v. Ashton* (1975) 45 Cal.App.3d 783, 787-788.)

Sands's sole suggestion regarding his standing to assert the claims in the complaint is that his relationship to the LLC amounted to a resulting trust. "'A resulting trust arises by operation of law from a transfer of property under circumstances showing that the transferee was not intended to take the beneficial interest. [Citations.] Such a resulting trust carries out and enforces the inferred intent of the parties. [Citations.]' [Citation.] 'It has been termed an "intention-enforcing" trust, to distinguish it from the other type of implied trust, the constructive or "fraud-rectifying" trust. The resulting trust carries out the inferred intent of the parties; the constructive trust defeats or prevents the wrongful act of one of them.' [Citations.] It differs from an express trust in that it arises by operation of law, from the particular facts and circumstances, and thus it is not essential to prove an express or written agreement to enforce such a trust.

[Citation.]" (*Fidelity National Title Ins. Co. v. Schroeder* (2009) 179 Cal.App.4th 834, 847-848.)

The facts asserted in Sands's declaration do not support the existence of a resulting trust, for purposes of establishing Sands's standing. It is well established that a resulting trust is "a creature of equity." (*Calistoga Civic Club v. City of Calistoga* (1983) 143 Cal.App.3d 111, 117-118.) Generally, a court of equity will not permit a party "to accomplish by indirection what the law or its clearly defined policy forbids to be done directly." (*Marsh v. Edelstein* (1970) 9 Cal.App.3d 132, 140-141.)

Here, the existence of a resulting trust is inconsistent with the creation and operation of the LLC, insofar as a resulting trust would have freed Sands from the constraint barring members of a limited liability company from asserting claims belonging to it. Sands's declaration establishes that he needed to create the LLC to comply with the restrictions governing the use of his retirement funds. Furthermore, in opposing summary judgment, he admitted that the other LLC members authorized him, as the LLC's manager, to buy the property and place its title in the LLC's name. Under these circumstances, to conclude that Sands established a resulting trust in forming the LLC and acting as its manager would be to hold that he could properly enjoy the benefits of the LLC while disregarding the limits it imposed on him. Accordingly, Sands failed to show a triable issue regarding his standing as holder of the "beneficial interest" in the LLC and the property.

C. *Standing Based on Assignment*

We turn to Sands's theory that he acquired standing to assert the claims in the complaint through an assignment from the LLC when it was dissolved. As

explained below, we conclude Sands's declaration was sufficient to raise a triable issue regarding the existence of an assignment.

Generally, "[a]n assignment requires very little by way of formalities and is essentially free from substantive restrictions. '[I]n the absence of [a] statute or a contract provision to the contrary, there are no prescribed formalities that must be observed to make an effective assignment. It is sufficient if the assignor has, in some fashion, manifested an intention to make a present transfer of his rights to the assignee.' [Citation.] Generally, interests may be assigned orally [citations], and assignments need not be supported by any consideration [citations]." (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1002, quoting 9 Corbin on Contracts (rev. ed. 2007) § 47.7, pp. 147–148.) These principles encompass the assignment of causes of action. (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court, supra*, at p. 1002.)

The statutory scheme governing limited liability companies imposes no special restrictions or requirements regarding the assignment of claims. Corporations Code section 17353 provides that when a limited liability company is dissolved and its debts are paid, "the remaining assets shall be distributed among the members according to their respective rights and preferences," with due attention to "the return of their contributions." (Corp. Code, § 17353, subd. (a)(2).) Corporations Code section 17354 further provides that a limited liability company "that is dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it in order to collect and discharge obligations, disposing of and conveying its property, and collecting and dividing its assets." (*Id.*, subd. (a).) Viewed jointly, these statutes establish that a limited liability company's causes of action are not automatically distributed to members upon dissolution, but erect no express barrier to the assignment of claims.

In the absence of special requirements for an assignment, the assignee's testimony, by itself, is ordinarily sufficient to support the existence of the assignment. (*Norton v. Consolidated Fisheries, Inc*. (1953) 120 Cal.App.2d 86, 90-91.) Here, Sands's declaration states: "I caused the LLC to be dissolved. When the LLC was dissolved, all of its remaining assets were distributed to and *assigned* to me." (Italics added.) As this statement is sufficiently broad to encompass the LLC's potential claims against third parties, we conclude that Sands's declaration is adequate to raise a triable issue regarding the existence of an assignment.

D. *Denial of Leave to Amend*

Because Sands did not allege an assignment in his complaint, the propriety of summary judgment hinges on the trial court's denial of his request for leave to amend. Sands requested leave to amend the complaint to allege that when the LLC was dissolved, "[Sands], as manager, distributed and assigned the assets, including the claims and causes of action [in the complaint], to Sands, the individual." In denying the request, the trial court concluded that Sands had offered a "sham pleading" that was not credible.

Ordinarily, it is an abuse of discretion to deny leave to amend if there is a "'reasonable possibility that the plaintiff can state a good cause of action.'" (*Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 768 (*Sanai*), quoting *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 245.) Nonetheless, the trial court is entitled to scrutinize a proposed amendment to guard against abuse of the litigation process. (*Sanai*, *supra*, 170 Cal.App.4th at p. 768.) Leave to amend is thus properly denied if the proposed amendment does not, in fact, cure the defect in the complaint. (*Soderberg v. McKinney* (1996) 44 Cal.App.4th 1760, 1773.) In addition, leave to amend is properly denied "when the proposed amendment omits

or contradicts harmful facts pleaded in a prior pleading unless a showing is made of mistake or other sufficient excuse for changing the facts. Absent such a showing, the proposed pleading may be treated as a sham. [Citations.]" (*Sanai, supra*, at p. 768.)

Here, the proposed amendments are properly interpreted in light of the evidence submitted in connection with the summary judgment motion, as they were offered to cure the defect in the complaint disclosed through the motion. (See (*FPI Development, Inc. v. Nakashima*, *supra*, 231 Cal.App.3d at p. 385.) So viewed, they are neither inadequate to cure the defect nor inconsistent with Sands's original complaint.

The key proposed allegation is that Sands, as the LLC's manager, assigned the LLC's causes to Sands as an individual. Although the trial court may have had good reason to be skeptical of this allegation, it is not spurious on its face. Courts have long recognized that small corporations operate in an informal manner, especially when members of the governing board conduct the corporation's business. (*Biren v. Equality Emergency Medical Group, Inc.* (2002) 102 Cal.App.4th 125, 137.) In some circumstances, these informal practices can confer authority on a member to bind the corporation with respect to specific matters, despite the absence of express approval from the other members. (*Ibid*.) Thus, "[p]articularly in the case of small, family-controlled corporations like Crane Valley, courts look at the substance of the transaction, and disregard mere irregularities in paper work." (*Crane Valley Land Co. v. Bank of America* (1960) 182 Cal.App.2d 166, 173.) Under these principles, Sands as manager may have been authorized to assign the LLC's claims to himself through the informal approval of the Cuifos, who are closely related to Sands. Because nothing before us forecloses this type of authorization, the proposed amendment cannot be rejected as inadequate on its face to cure the defect in the complaint.

Nor is the proposed allegation inconsistent with the original complaint, even though the complaint does not mention the LLC or the assignment. The assignee of a claim may sue in his or her own name. (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2012) 203 Cal.App.4th 1328, 1335.) Although the assignee should allege the assignment in the complaint (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 909, p. 323), failure to do so is curable by an amendment to the complaint when the amendment does not materially alter the claims asserted (*Miller v. Republic Grocery, Inc.* (1952) 110 Cal.App.2d 187, 190-194 (*Miller*)). That is the case here.

The original complaint identified Sands as the individual who interacted with respondents and made decisions regarding the property, but does not specify the capacity in which he acted. Viewed in the light of the original complaint and the evidence submitted in connection with the summary judgment motion, the import of the proposed amendment is that after Sands hired respondents to act for him as an individual, his relationship with them attached to the LLC upon its formation, when he began dealing with them as the LLC's manager. The proposed amendment thus does not alter the duties attributed to respondents or allege new facts regarding their breaches of those duties, but merely modifies the identity of the party to whom the duties were ultimately owed. Accordingly, the proposed amendment does not assert new claims against respondents. (See *Klopstock v. Superior Court*, *supra*, 17 Cal.2d at p. 20 [amendment to complaint to substitute new plaintiff pleads different cause of action only when "an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant"].)

We recognize that the trial court based its ruling on credibility determinations, that is, it found that the proposed amendment was not credible because Sands offered insufficient evidence to support it. In concluding that the

assignment probably did not exist, the court rejected Sands's declaration because it was uncorroborated, and also found that Gravink's declaration did not offer a plausible explanation why the complaint failed to allege the assignment if it indeed existed when the complaint was filed. Ordinarily, in reviewing a denial of leave of amend, we defer to the court's determinations of credibility. (*American Advertising & Sales Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 879.) Under the circumstances present here, however, the court's misgivings regarding Sands's offer of proof were insufficient to justify denying leave to amend.

Generally, when a plaintiff proposes amendments to a complaint that contradict its allegations, the trial court may properly scrutinize the plaintiff's credibility to determine whether the plaintiff is "playing fast and loose with the truth" or acting in bad faith. (*American Advertising & Sales Co. v. Mid-Western Transport, supra*, 152 Cal.App.3d at p. 879.) This is because "a proposed amendment which contradicts allegations in an earlier pleading will not be allowed in the absence of 'very satisfactory evidence' upon which it is 'clearly shown that the earlier pleading is the result of mistake or inadvertence.'" (*Ibid*., quoting *Tognazzi v. Wilhelm* (1936) 6 Cal.2d 123, 127.)

In contrast, when the proposed amendments do not contradict the allegations in the original complaint, the trial court ordinarily should grant leave to amend, even though it reasonably suspects that the plaintiff cannot prove the new allegations. (*Sanai, supra*, 170 Cal.App.4th at pp. 768-771.) In *Sanai*, after prolonged proceedings involving several appeals, the plaintiff sought leave to amend his complaint to include allegations supporting a new cause of action. (*Id*. at pp. 751-762.) Accompanying the request was a declaration from the plaintiff describing his belated discovery of the purported new facts. (*Id*. at pp. 766-767.) The trial court denied leave to amend, reasoning that the plaintiff had offered

evidence insufficient to establish his claim and that the litigation's history raised the potential for "'the manufacturing of facts and the threat of sham pleading.'" (*Id*. at p. 767.)

In reversing, the appellate court acknowledged that the litigation's history supported the trial court's skepticism regarding the plaintiff's ability to prove his claim. (*Sanai*, *supra*, 170 Cal.App.4th at pp. 769-770.) Nonetheless, because the proposed allegations did not contradict the underlying pleading, the appellate court concluded that the only issue properly before the trial court was whether the allegations were sufficient to state a cause of action, not whether the plaintiff's evidence would be "sufficient to prevail at trial or even to survive summary judgment." (*Id*. at p. 769.) The appellate court explained that under the circumstances, "the trial court [was] simply without power to demand, as the condition for leave to amend, that a party present admissible evidence sufficient to withstand summary judgment." (*Id*. at p. 770.)

As explained above, Sands's proposed amendments are consistent with the original complaint and sufficient to cure the defect in it. In addition (see pt. C., *ante*), his declaration is sufficient to raise a triable issue regarding the existence of the assignment. Gravink's declaration further stated that he was unaware of any dispute regarding Sands's standing until March 2011, shortly before respondents filed their summary judgment motion, and the record otherwise discloses no fabrications or bad faith conduct by Sands. As the reasons for rejecting Sands's proposed allegations were considerably less compelling than those present in *Sanai*, we conclude leave to amend should have been granted. (See also *Burkle v. Burkle* (2006) 141 Cal.App.4th 1029, 1042 [trial court erred in denying leave to amend complaint to add new claims after plaintiff raised triable issues regarding facts supporting new claims in opposing defendant's summary judgment motion].)

Respondents contend the denial of leave to amend is properly affirmed on other grounds upon which the trial court did not rely. They argue that Sands violated a rule that obliged him to file a motion to amend prior to the hearing on the summary judgment motion. They also maintain that Gravink's declaration failed to explain the delay in the presentation of the motion to amend, and that the proposed amendments would prejudice them if permitted. However, because the trial court clearly declined to deny leave to amend on the basis of these considerations, they do not provide alternative grounds for affirming the ruling. (*Sidney v. Superior Court* (1988) 198 Cal.App.3d 710, 718; *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1149.) Furthermore, as explained below, we would reject these contentions on their merits were we to consider them.

To begin, the trial court was not required to deny Sands's motion to amend because it was filed after the original hearing on the summary judgment motion. The liberal policy governing leave to amend may oblige a trial court to allow amendment of the complaint to cure a standing defect even after the beginning of trial. (*Miller, supra*, 110 Cal.App.2d at pp. 190-193.) Although some appellate courts have stated that a motion to cure a pleading defect disclosed through a summary judgment motion must be made before the hearing on the motion (see, e.g., *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648), there is no rule mandating the denial of leave to amend under those circumstances. This purported rule is traceable to dicta in *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 18, which relied on case authority providing no support for any such rule. (*Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1069 & fn. 7 (*Kirby*).) On the contrary, appellate courts have found an abuse of discretion in denying leave to amend when the plaintiff sought to amend *after* the hearing on the summary judgment motion. (*Id.* at pp. 1067-1070 [leave to amend sought in motion for

reconsideration after grant of summary judgment]; *Atkinson*, *supra*, 109 Cal.App.4th at pp. 760-761 [leave to amend requested after grant of summary judgment].)

Furthermore, the purported rule would not support the denial of leave to amend even if it existed. The record discloses that Sands initially requested leave to amend in his opposition to the summary judgment motion. At the hearing on the motion, the trial court elected to give Sands an opportunity to file a motion to amend and continued the hearing on the summary judgment motion. Later, at the combined hearing on the motions, the court stated that it would not deny leave to amend on the basis of the purported rule. As the continuance of the hearing on the summary judgment motion brought Sands's request to amend into material compliance with the purported rule, it cannot be regarded as a basis for affirming the denial of leave to amend. (See *Burkle v. Burkle*, *supra*, 141 Cal.App.4th at p. 1042, fn. 9 [plaintiff effectively complied with purported rule by filing motion to amend two days before hearing on summary judgment motion].)

Respondents' contentions regarding unwarranted delay and prejudice also fail on the record before us. Although in some circumstances the plaintiff's unexplained delay in seeking to allege a fact long known to the plaintiff may independently support the denial of leave to amend (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486-487), a proper denial due to delay is ordinarily rooted in the existence of prejudice to the defendants (*Atkinson, supra,* 109 Cal.App.4th at pp. 760-761).

As noted above, Gravink's declaration stated that Sands's standing did not appear to be in dispute until March 2011, shortly before respondents sought summary judgment. Because Sands promptly requested leave to amend in opposing summary judgment, we discern no unwarranted delay. (See *Kirby*, *supra*, 11 Cal.App.4th at pp. 1067-1069 [after granting summary judgment, trial

court erred in denying leave to amend complaint to allege facts known or knowable by plaintiffs before filing of complaint, as complaint stated what appeared to be meritorious claims imperfectly pleaded].)

Nor do we discern the existence of prejudice to respondents. As explained above, the proposed amendments neither change Sands's status as plaintiff nor modify the material facts relevant to his claims, but merely add a factual allegation regarding his standing, namely, the existence of the assignment. Under the circumstances, allowing respondents discovery into the purported assignment would be sufficient to dispel any prejudice arising from their inability to challenge its existence. (*Fair v. Bakhtiari*, *supra*, 195 Cal.App.4th at pp. 1149-1150 [prejudice to defendants from permitting amendment of complaint to allege new claim after trial could be eliminated by limited discovery into claim].) The fact that the amended complaint may require additional proceedings to test the new allegations is not sufficient, in itself, to show prejudice to respondents. (See *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.) Furthermore, although Overton's declaration in opposition to the motion to amend states that the amendments would waste "hundreds of hours" respondents had devoted to pending summary judgment motions incorporating the assumption that Sands owned the property, Gravink offered to stipulate to any changes needed in the motions so that they could be heard. Accordingly, the record discloses no basis for denying leave to amend due to prejudice to respondents.[6]

---

[6] In related contentions, respondents maintain the denial of leave to amend is properly affirmed on the basis of defects in Sands's motion upon which the trial court did not rely. Respondents argue (1) that Sands failed to file a notice of motion, and (2) that Gravink's supporting declaration does not state when the fact to be alleged -- that is, the assignment -- was discovered, in contravention of California Rules of Court, rule 3.1324(b). As explained below, we reject these contentions.

(Fn. continued on next page.)

Respondents also contend that even if the amendments were permitted, the amended claims would be time-barred under the applicable statute of limitations. Before the trial court, they argued that because the gravamen of Sands's claims -- as pleaded in the original complaint and as amended -- is professional negligence, the claims are subject to the two-year limitations period stated in Code of Civil Procedure section 339, subdivision (1) (see *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1153-1158). They further argued that Sands's amended claims were necessarily time-barred because the claims in his original complaint accrued no later than July 2007, that is, more than two years before the original complaint was filed in September 2009. We disagree.

Assuming -- without deciding -- that Sands's claims are subject to the two-year limitations period for professional negligence, the claims did not accrue until Sands "(1) sustain[ed] damage and (2) discover[ed], or should [have] discover[ed], the negligence." (*Roger E. Smith, Inc. v. SHN Consulting Engineers & Geologists*,

---

Regarding item (1), Gravink's declaration in support of the motion to amend asserts that the parties waived notice at the original hearing on respondents' summary judgment motion. Although respondents dispute this assertion on appeal, they opposed the motion to amend on the merits and appeared at the hearing on it. As respondents have shown no prejudice from the absence of the notice of motion, the contention fails. (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1288-1289.)

Regarding item (2), rule 3.1324(b)(3) of the California Rules of Court states that the declaration accompanying a motion to amend must specify "[w]hen the facts giving rise to the amended allegations were discovered . . . ." Although Gravink's declaration does not comply with the rule, that defect cannot be regarded as fatal to the motion, as the proposed amendments facially disclose when Sands "discovered" the assignment, namely, during the dissolution of the LLC. Furthermore, the trial court examined the summary judgment motion prior to ruling on the motion to amend. In opposing summary judgment, Sands submitted a declaration stating that the assignment occurred when the LLC was dissolved. This declaration was sufficient to establish when the assignment was "discovered."

Inc. (2001) 89 Cal.App.4th 638, 650-651.) Because respondents attempt to establish the time of accrual by reference to Sands's original complaint, "the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred. [Citation.]" (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.)

Here, the original complaint alleges that after the property was purchased, the rental income from the property was less than expected. After Sands sought an explanation, respondents told him that the seller had exaggerated the rental income and, at respondents' urging, Sands permitted them to negotiate a settlement with the seller, which secured $13,200 for him. Later, in July 2007, when Sands told respondents he wanted to sell the property due to the inadequate rental income, they advised him to invest more funds in the property to enhance its rental income. Relying on their advice, Sands did so, but the improvements to the property did not increase its rental income. In September 2008, Sands listed the property for sale.

As the complaint alleges that Sands trusted respondents when they attributed the shortfall in the rental income to the seller's misrepresentations, the complaint supports the reasonable inference that Sands first knew, or should have known, the facts relevant to respondents' negligence at some point after July 2007, when the improvements to the property did not increase its rental income. (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 931 [defendant's concealment of responsibility for plaintiff's damages tolls accrual of claim].) Although that point occurred before Sands listed the property for sale in September 2008, the complaint does not specify when the improvements were completed. Accordingly, the allegations in the original complaint do not establish that Sands's original claims accrued more than two years before the original complaint was filed in September 2009.

Furthermore, the proposed amendments to the complaint would not render the amended claims time-barred. When a complaint is amended to substitute the proper plaintiff for a plaintiff who lacks standing, the amended complaint "relates back" to the filing of the original complaint if the amendments do not introduce new causes of action. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 243-244.) In view of this principle, the amendment of Sands's complaint to establish his standing will also "relate back" to the filing of the original complaint, as the proposed amendments do not change his claims.[7]

We therefore conclude that the trial court erred in denying Sands's request for leave to amend. For this reason, summary judgment on his original complaint was improper.

---

[7] In a related contention, respondents contend the proposed amendments are barred under the doctrine of judicial estoppel, which prohibits a party from abandoning a position upon which the party prevailed in prior proceedings (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183). As Sands never obtained any favorable ruling on the basis of the nonexistence of an assignment before he filed his motion to amend, the doctrine is inapplicable here.

DISPOSITION

The judgment is reversed, and the matter is remanded with directions to vacate the grant of summary judgment and the denial of leave to amend, and to conduct further proceedings in accordance with this opinion. Sands is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.