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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SCSS HOLDINGS, INC., Plaintiff and Appellant, v. CONEJO VALLEY UNIFIED SCHOOL DISTRICT, Defendant and Appellant.	2d Civil Nos. B288381 (consolidated w/B288509) (Super. Ct. No. 56-2016-00481228-CU-BC-VTA) (Ventura County)

SCSS Holdings, Inc. (SCSS) appeals from the judgment entered after the trial court granted the motion for summary judgment filed by Conejo Valley Unified School District (CVUSD) in this action for breach of contract. SCSS contends the trial court erred when it found SCSS did not comply with the claims presentation requirements of the Government Claims Act and when it denied SCSS leave to amend to allege facts showing

compliance. (Gov. Code, §§ 910, et seq.)[1] CVUSD appeals from the trial court's order denying its motion to recover defense costs under Code of Civil Procedure sections 1038 and 2033.420. We reverse the judgment because we conclude the trial court erred when it denied leave to amend.

Facts

SCSS owns commercial real property located on Rancho Conejo Boulevard in Thousand Oaks. CVUSD owns property on the same street and shares a parking lot with SCSS. Each property owner is subject to a Declaration of Covenants, Conditions and Restrictions (CC&Rs). The CC&Rs include a site plan depicting the number and location of parking spaces available on the property for the use of all three property owners. They further provide, "All of the vehicle parking area . . . is, and shall remain, a paved and improved area with at least the number of Shared Parking Spaces as shown on" the site plan. The CC&Rs may be modified or amended "by a written instrument executed by all of the Owners of the Parcels."

In March 2016, CVUSD began a construction project on its property that caused changes to the configuration of shared parking spaces. CVUSD did not obtain consent for the changes from SCSS.

On March 20, 2016, the "owner" of SCSS, Steve Banerjee, sent an email to David Fateh, Director of Planning and Construction for the school district. He forwarded a copy of the email to Dr. Ann Bonitatibus, the school district's superintendent and the person designated by it to receive claims on its behalf. The email states, "Following up on our telephone conversation on

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[1] All statutory references are to the Government Code unless otherwise stated.

Friday, March 18, 2016 at around 9:30 a.m. please be advised that this email serves as a notice to Conejo Valley Unified School District (CVUSD) for violation of the existing CC&R encompassing the common areas of the three properties located at 667, 703 and 711 Rancho Conejo Blvd, Newbury Park, CA 91320. [¶] Specifically, I pointed out to you that CVUSD has engaged in construction activity related to shared parking area that is not permitted under the terms of the prevailing CC&R. [¶] I also pointed out to you Paragraph 16 of the CC&R which mandates payment of legal fees incurred by a prevailing party in a court judgment: [¶] 16. Attorney Fees: If an action is commenced to enforce or interpret any provision hereof, the prevailing party as determined by a final court judgment shall be entitled to recover from the other party such reasonable attorney fees and expenses incurred in the action as the court may award. [¶] As per the conversation, you indicated that you will get back to me with a response no later than Wednesday March 23, 2016. [¶] A copy of the CC&R is enclosed. [¶] Please do not hesitate to contact me if you have any question."

On April 21, 2016, Banerjee emailed Dr. Bonitatibus directly. This email describes the parking lot dispute and Banerjee's discussions with Mr. Fateh, noting that the two "have been trying to work out an amicable solution to the problem without me having to seek legal assistance. However, we have hit an impasse." Banerjee states that CVUSD's construction reduced the number of shared parking spaces from 41.5 to 35. He concludes, "The CC&R is a legally binding document. It provides for legal fees payable to any of the owners who prevail in a lawsuit against another. I have tried my best to be flexible in order to avoid dragging this matter into the courts. However, it

has come to a point where I have no other option. [¶] Please be advised that if I do not receive an appropriate response from CVUSD by Tuesday April 26, 2016, I will retain an attorney to pursue charges against the school district."

The issue was not resolved. Two weeks later, on May 4, 2016, SCSS filed a complaint seeking damages for breach of contract and injunctive relief. When the trial court denied SCSS's request for a preliminary injunction, it filed an amended complaint seeking only damages for the school district's breach of the CC&Rs.

CVUSD filed a motion for summary judgment raising a single issue: SCSS's claim is barred because SCSS did not comply with the claims presentation requirements of the Government Claims Act. (§ 910, et seq.) Although its opposition to the motion referenced both the March 20 and April 21 emails, SCSS contended its April 21 email substantially complied with the claims presentation requirements. SCSS also contended it could amend its complaint to allege compliance with the statute.

The trial court granted summary judgment. It concluded the first amended complaint did not allege compliance with the statute and could not be amended to do so. It concluded the April 21 email did not satisfy the claims presentation requirement because: the statute does not authorize presentation of a claim by email; the email does not include a demand for payment of monetary damages; and SCSS filed its complaint before the school district's time to respond to the email expired. The trial court did not address the question whether the April 21 or March 20 emails were a "claim as presented," within the meaning of section 910.8, triggering CVUSD's obligation to notify SCSS of insufficiencies in the claim.

Standard of Review

We independently review the trial court's decision to grant summary judgment, applying the same legal standard as the trial court. (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) To prevail, the moving papers on a motion for summary judgment must show the nonexistence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. (*LPP Mortgage, Ltd. v. Bizar* (2005) 126 Cal.App.4th 773, 776; Code Civ. Proc. § 437c, subd. (c).)

"'A motion for summary judgment may effectively operate as a motion for judgment on the pleadings.' [Citation.] Where the complaint is challenged and the facts indicate that a plaintiff has a good cause of action which is imperfectly pleaded, the trial court should give the plaintiff an opportunity to amend." (*Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1067.) Leave to amend should be liberally allowed. (*Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1348 (*Kempton*).)

We review the trial court's decision to deny leave to amend for abuse of discretion. "To show an abuse of discretion, the plaintiff has the burden of demonstrating that 'there is a reasonable possibility the plaintiff could cure the defect with an amendment.' [Citation.]" (*Foundation for Taxpayer and Consumer Rights v. Nextel Communications, Inc.* (2006) 143 Cal.App.4th 131, 135.) "Where a complaint could reasonably be amended to allege a valid cause of action, we must reverse the judgment." (*Kempton, supra*, 165 Cal.App.4th at p. 1348.)

Discussion

A "claim" for "money or damages against local public entities" must be "presented" to the entity (§ 905) before a lawsuit on that claim may be filed against it. (§ 945.4.) The claim must include certain facts and be signed by the claimant or by someone acting on his or her behalf. (§§ 910, 910.2.) "If the public entity determines a 'claim as presented' fails to comply substantially with sections 910 and 910.2, and is therefore defective, the public entity may either 'give written notice of [the claim's] insufficiency, stating with particularity the defects or omissions therein' within 20 days [citation], or waive any defense 'as to the sufficiency of the claim based upon a defect or omission in the claim as presented. . . .' [Citation.]" (*Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699, 705 (*Phillips*).)

In its opposition to the motion for summary judgment, SCSS contended the April 21 email satisfied or substantially complied with the presentation requirements of the Government Claims Act. SCSS now contends the complaint could be amended to allege compliance with the Act based on the March 20 email because that email is a "claim as presented" within the meaning of section 910.8. "[A] document constitutes a 'claim as presented' . . . if it discloses the existence of a 'claim' which, if not satisfactorily resolved, will result in a lawsuit against the entity." (*Phillips*, *supra*, 49 Cal.3d at p. 709.) A claim as presented "'triggers a duty on the part of the government entity to notify the claimant of the defects or omissions in the claim. A failure to notify the claimant of the deficiencies in a "claim as presented" waives any defense as to its sufficiency.' [Citation.]" (*Olson v. Manhattan Beach Unified School Dist.* (2017) 17 Cal.App.5th 1052, 1062.)

The court in *Phillips* concluded a letter advising a public hospital that an individual "intends to commence an action against [the hospital] . . . for medical malpractice" constituted a "claim as presented," even though the letter did not include some of the information required by section 910. (*Phillips, supra*, 49 Cal.3d at pp. 703, 709.) In *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, by contrast, the court found that correspondence between parties involved in a redevelopment project was not a "claim as presented" because the plaintiff never indicated "that litigation might ensue if defendant[] did not comply with the terms under discussion." (*Id.* at p. 744.)

In *Foster v. McFadden* (1973) 30 Cal.App.3d 943 (*Foster*), the plaintiff was struck by a bulldozer operated by an employee of a sanitation district. His attorney wrote to the employee, with a copy to the sanitation district, identifying the accident and asking the employee to forward the letter to his insurance carrier. Its closing sentence read, "Trusting we may hear from you shortly, and thus eliminate the necessity for initiating formal proceedings and inconvenience to all parties." (*Id.* at p. 945, fn. 2.) The court of appeal concluded this letter "accomplished the two principal purposes of a sufficient claim. It afforded the district the opportunity to make a prompt investigation of the accident . . . and it gave to the district the opportunity to settle without suit, if it so desired." (*Id.* at p. 949.) Other courts have noted that the letter's final sentence strongly implied a threat of litigation when it referred to "'the necessity for initiating formal proceedings . . . .'" (*Green v. State Center Community College Dist.* (1995) 34 Cal.App.4th 1348, 1358-1359 (*Green*), italics omitted.)

Schaefer Dixon Associates v. Santa Ana Watershed Project Authority (1996) 48 Cal.App.4th 524, involved a dispute between a contractor and a water authority over payment for soil testing services. Throughout the two-year life of the project, the parties engaged in lengthy correspondence, disputing whether, and to what extent, the contractor was entitled to additional fees based on construction delays and increased costs. When the contractor finally filed a complaint for breach of contract, the water authority sought summary judgment on the ground that the contractor had not complied with the Government Claims Act. The court of appeal concluded the letter identified by the contractor as its "claim as presented" was not sufficient. "Although the intended purpose of the . . . letter here was to advise of a monetary dispute, the plain import of the letter was merely to provide information and to request negotiation of an ongoing dispute, and not to advise of imminent litigation over a 'claim.' . . . The contractor merely asked the general manager of the agency for his personal attention to and intervention in the course of the ongoing dispute." (*Id.* at p. 534.)

In our view, the March 20, 2016 email was sufficient to trigger the notice or waiver provisions of section 910.8. (*Phillips*, *supra*, 49 Cal.3d at p. 705.) The email states that it serves as notice to the school district of SCSS's claim that the construction project violates the CC&Rs. It also reminds the school district that the CC&Rs mandate payment of attorney fees "incurred by a prevailing party in a court judgment." This statement does more than provide information or request negotiation of an ongoing dispute. It is a strong implication that SCSS will resort to litigation if CVUSD does not remedy its violations of the CC&Rs.

CVUSD contends the March 20 email is not a "claim as presented" because it was not addressed to the district superintendent and because its "plain import" was only to summarize conversations between the parties. CVUSD claims it had no way of knowing the email was a "claim" because it does not expressly object to the construction or include a demand for damages. We disagree.

SCSS forwarded the email to the superintendent, the person designated by the school district to receive such claims. The email expressly objects to the construction when it states that it "serves as a notice" to the school district that "construction activity related to [the] shared parking area" is "not permitted" under the CC&Rs. The email also does more than summarize prior conversations or invite further negotiations. Referencing the possibility of litigation, the email reminds the school district that the CC&Rs provide for the payment of attorney fees to the "prevailing party in a court judgment." These statements trigger the notice and waiver provisions of section 910.8 because they disclose the existence of a claim which, if not resolved, will result in a lawsuit. (*Phillips*, *supra*, 49 Cal.3d at p. 709; see also *Green*, *supra*, 34 Cal.App.4th at p. 1358.)

Relying on *Falcon v. Long Beach Genetics*, *Inc.* (2014) 224 Cal.App.4th 1263 (*Falcon*), CVUSD contends SCSS unreasonably delayed seeking leave to amend its complaint to allege the March 20 email was a "claim as presented." In *Falcon*, biological parents and their child sued a testing laboratory for negligence after the lab erroneously reported the result of a paternity test. The lab moved for summary judgment on the ground that it reported the test result in connection with a paternity proceeding, so the report was privileged under Civil

Code section 47, subdivision (b). Two years after filing their original complaint, the parents filed an ex parte motion to amend the complaint to allege a cause of action for gross negligence on the new factual theory that the lab had discovered its error years earlier but never informed the parents. (*Falcon*, *supra*, at p. 1269.)

The court of appeal concluded the trial court did not abuse its discretion when it denied leave to amend. "[U]nwarranted delay in seeking leave to amend may be considered by the trial court when ruling on a motion for leave to amend [citation], and appellate courts are less likely to find an abuse of discretion where, for example, the proposed amendment is "'offered after long unexplained delay . . . or where there is a lack of diligence'" [citation]. Thus, when a plaintiff seeks leave to amend his or her complaint only after the defendant has mounted a summary judgment motion directed at the allegations of the unamended complaint, even though the plaintiff has been aware of the facts upon which the amendment is based, '[i]t would be patently unfair to allow plaintiffs to defeat [the] summary judgment motion by allowing them to present a "moving target" unbounded by the pleadings.' [Citations.]" (*Falcon*, *supra,* 224 Cal.App.4th at p. 1280.)

Falcon is distinguishable. There has been no "long unexplained delay" here. SCSS filed its complaint in May 2016, before CVUSD's construction project was completed. It sought leave to amend 15 months later, at the hearing on CVUSD's motion for summary judgment. In *Falcon*, *supra*, 224 Cal.App.4th 1263, by contrast, the plaintiffs filed their complaint six years after taking the paternity test and nearly two years after discovering the lab's error. (*Id.* at p. 1268.) They waited

two more years to seek leave to amend. Second, the plaintiffs in *Falcon* sought to add factual allegations that were inconsistent with their original pleading and with admissions made in their opposition to the motion for summary judgment. (*Id.* at pp. 1281-1282.) SCSS, by contrast, seeks to allege that the March 20 email was a "claim as presented," triggering the notice or waiver provisions of section 910.8. These facts are not inconsistent with SCSS's prior pleadings. In addition, they do not present a new theory of liability. SCSS's opposition to the motion for summary judgment included references to the March 20 email.

As the court noted in *Falcon*, "A trial court has wide discretion to allow the amendment of pleadings, and generally courts will liberally allow amendments at any stage of the proceeding. [Citation.] On a motion for summary judgment "'[w]here the complaint is challenged and the facts indicate that a plaintiff has a good cause of action which is imperfectly pleaded, the trial court should give the plaintiff an opportunity to amend.'" [Citation.]" (*Falcon*, *supra,* 224 Cal.App.4th at p. 1280.)

Here, the first amended complaint did not allege the March 20 email satisfied the claim presentation requirements. We have concluded that it was a "claim as presented," within the meaning of *Phillips*, *supra*, 49 Cal.3d 699, and *Foster*, *supra*, 30 Cal.App.3d 943. Consequently, SCSS has demonstrated it could amend its complaint to cure the defect. (*Foundation for Taxpayer and Consumer Rights v. Nextel Communications, Inc.*, *supra*, 143 Cal.App.4th at p. 135.) The trial court's order denying leave to amend was, therefore, an abuse of discretion. (*Ibid.*) "Where a complaint could reasonably be amended to allege a valid cause of action, we must reverse the judgment." (*Kempton*, *supra*, 165 Cal.App.4th at p. 1348.)

CVUSD's Appeal

CVUSD's appeal challenges the trial court's denial of its motion to recover defense costs under Code of Civil Procedure, section 1038. The statute allows a trial court, under limited circumstances, to award defense costs to the defendant prevailing on a motion for summary judgment in a civil proceeding under the Government Claims Act. Because we have concluded the trial court erred in granting the school district's motion for summary judgment, it is not necessary for us reach the issues raised in its appeal.

Conclusion

The judgment is reversed. SCSS shall recover its costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Kent M. Kellegrew, Judge

Superior Court County of Ventura

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