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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JIM KELLY, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B230301 (Los Angeles County Super. Ct. No. TC024256)

APPEAL from a judgment of the Superior Court of Los Angeles County, William P. Barry, Judge. Affirmed.

Jim Kelly, in pro. per., for Plaintiff and Appellant.

Office of County Counsel, Casey Yourn, Deputy County Counsel, for Defendants and Respondents.

Jim Kelly appeals from a judgment of dismissal after the sustaining of a demurrer without leave to amend. The demurrer of respondents County of Los Angeles (County) and Dennis Tom was to appellant's first amended complaint. The court ruled that the only remaining cause of action, for fraud, was barred by the general three-year statute of limitation in Code of Civil Procedure section 338, subdivision (d). This general statute of limitation is inapplicable in a case governed by the Government Tort Claims Act (Gov. Code, § 810 et seq., "the Act"). The demurrer was, thus, sustained on an improper ground. The demurrer also alleged that appellant could not state a cause of action for fraud under the Act. (Gov. Code., §§ 818.8, 822.2.) Since that ground was meritorious, we affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL SUMMARY

As alleged in the operative first amended complaint, plaintiff bought a fixer-upper property in Torrance in 1981. In 1996, he obtained a building permit to replace the roof. Michael Duette, a County building inspector, was sent to perform a framing inspection. Duette allegedly held a personal grudge against appellant, who had opposed an attempted rezoning supported by Duette. Duette accused appellant of modifying the attic and basement of the single-family residence to create more than a dozen guest rooms, which he then rented out. Duette also accused appellant of converting a detached rear garage into living quarters without a permit. As a result, appellant had been refused building permits for various projects over the years, most recently in November 2008. The County had pressured him to tear down the rear living quarters.

In 2006, Dennis Tom, a County building inspector, prepared a report on the property for a court proceeding. Appellant first received the report at a criminal hearing on March 26, 2007. Tom incorrectly reported that the third floor of the main house consisted of three bedrooms and two bathrooms when, in actuality, the third floor was an attic with two rooms and no bathrooms. Tom also reported that an inspection had revealed alterations to the garage, for which no Building and Safety permits could be found on record. Tom's report listed all permits for the property, but did not include

"plot plan # 2231," which was referenced in a 1956 building permit. Appellant did not receive the plot plan until after a Regional Planning meeting in late 2008, at which Tom called appellant "a liar." The plot plan showed that the rear garage had been converted into living quarters back in 1956.

On April 19, 2010, appellant filed a complaint in propria persona, alleging ten causes of action against seven County defendants. The court sustained the defendants' demurrer with leave to amend. Appellant then filed a first amended complaint, alleging negligence and fraud against the County and Tom. In both complaints, appellant sought compensatory and punitive damages and alleged he had complied with the applicable claims statute. Respondents demurred on the same general grounds alleged in the original demurrer: appellant failed to identify a statutory duty and failed to plead ultimate facts; respondents were immune from liability; the fraud cause of action was barred by the statute of limitation in Code of Civil Procedure section 338, subdivision (d); and the causes of action were uncertain.

At the hearing on the demurrer, appellant indicated he intended to dismiss the cause of action for negligence and pursue only the cause of action for fraud under Government Code section 822.2, the immunity exception for corruption and actual malice. Appellant clarified that Tom's report, the accuracy of which he challenged, was produced as part of a criminal proceeding against him that eventually was dismissed.

The parties and the court proceeded under the assumption that the three-year statute of limitation applied to the cause of action for fraud. Appellant acknowledged the allegation regarding Tom's misstatement about the main house was barred by that statute. But he insisted that the allegation about the misstatement regarding the rear garage was timely since he sued within three years of receiving the plot plan that confirmed the garage had been converted into living quarters before he bought the property. The court ruled that the entire cause of action for fraud accrued when appellant received Tom's report in 2007 and was therefore time barred.

Three days after the court sustained respondents' demurrer without leave to amend, appellant filed a purported proposed order. In it, among several arguments,

appellant asked the court for an opportunity to amend the complaint once more in order to allege that it was timely filed under Government Code section 945.6 after the County rejected appellant's claim for damages. The court considered the proposed order as a motion for reconsideration, denied it, and dismissed the case. This timely appeal followed.

DISCUSSION

I

We review de novo the trial court's sustaining of a demurrer. (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 122.) "When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "[W]e assume the truth of the facts alleged in the complaint and the reasonable inferences that may be drawn from those facts." (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 883.) The judgment will be affirmed if we uphold any of the grounds of a general demurrer. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

II

Since the Act governs actions for damages against public entities and public employees, appellant argues that the statute of limitation in Government Code section 945.6, rather than the general statute of limitation for fraud in Code of Civil Procedure section 338, subdivision (d), applies. We agree.

Actions against public defendants are governed by the specific statute of limitation set forth in the Act rather than by the statute of limitation applicable to private defendants. (*County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263,

1267.) Respondents argue that they may take advantage of other statutes of limitation because their liability is subject to any defenses that would be available to them if they were private persons. (Gov. Code, §§ 815, subd. (b), 820, subd. (b).) The general language of these provisions was intended to extend to public defendants ordinary defenses to liability, such as contributory negligence and assumption of the risk. (Sen. Com. com., West's Ann. Gov. Code (1995 ed.) foll. § 815, pp. 167–168.) It says nothing about the applicable statute of limitation. To the contrary, the intent to make the general statutes of limitation inapplicable to actions under the Act is well established. (See *Martell v. Antelope Valley Hospital Medical Center* (1998) 67 Cal.App.4th 978, 982, quoting 4 Cal. Law Revision Com. Rep. (Jan. 1963) p. 1014 ["'The general statutes of limitation would . . . have no application to actions against public entities upon causes of action for which claims are required to be filed'" (italics omitted)].) Since the general statute of limitation for fraud does not apply in this case, it was error to sustain the demurrer on the ground that the fraud cause of action was barred by Code of Civil Procedure section 338, subdivision (d).

Relying on the County's denial of his claim for damages, appellant argues his fraud claim is timely under the Act. Respondents point out that the relevant evidence—the County's letter rejecting appellant's claim—is not in the record because it was not timely presented to the trial court. In turn, appellant complains that he failed to present this evidence because, at the hearing on the demurrer, he only answered the trial court's questions and was not allowed to put on his case. The demurrer did not allege that the fraud cause of action was time barred under the Act, and we consider only grounds raised in the demurrer. (*Aubry v. Tri-City Hospital Dist*., *supra*, 2 Cal.4th at p. 967.)

III

The demurrer asserted that respondents had immunity under various provisions of the Act, among which were Government Code sections 818.8 and 822.2.

Appellant argues his fraud claim falls within the exception to governmental immunity in Government Code section 822.2. That section provides that a public employee is immune for negligent and intentional misrepresentation, "unless he is guilty

of actual fraud, corruption or actual malice." This exception applies only if, in addition to the elements of common law deceit, a plaintiff also alleges facts showing in a nonconclusory fashion that a public employee is motivated by "'corruption or actual malice, i.e., a conscious intent to deceive, vex, annoy or harm the injured party.' [Citations.]" (*Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 649 (*Curcini*).)

In *Curcini*, *supra*, 164 Cal.App.4th at page 650, the court reviewed allegations that misrepresentations made during the bid process for awarding a public contract were made "'for corrupt purposes and/or with malice towards plaintiffs and their interests' and that defendants' conduct 'was intended . . . to cause injury to plaintiffs or constituted despicable conduct which was carried on by defendants, and each of them, with a willful and conscious disregard of the rights of plaintiffs.'" The court held them to be conclusory. (*Ibid*.) Similarly here, appellant alleges in a conclusory fashion that Tom's report was "a DELIBERATE HATCHET JOB with the intent to harm Plaintiff and put him in his place for good," and that Tom "deliberately committed 'actual fraud' with the addition of false information and the omission of actual information with the intent to harm Plaintiff . . . ." (Capitalization in the original.)

Apart from the alleged misstatements or omissions in the report, the only other allegation is that Tom called appellant "a liar" at a Regional Planning meeting. There are no facts indicating that Tom was motivated by actual malice or corruption. Rather, the complaint indicates that Tom "was specifically chosen because of his great experience and supposed neutrality." In his briefs on appeal, appellant clarifies that he "hand-picked" Tom to write the report. He then repeats the conclusory allegations that Tom "intended to commit [m]alice" and "[t]his malice did, in fact, injure appellant by depriving him of his right to an honest unbiased report, by supporting the fiction that appellant had converted the rear house into living quarters and by extending the damage to appellant's pocket book." Yet, he also states that the most culpable of "all the players in this drama" was Duette, who produced "fraudulent information" in 1998, which Tom included in the 2006 report. Appellant's complaint against Tom is that, instead of independently inspecting the property and the public records, Tom relied on

misinformation provided earlier by Duette and "repeated over the years in many documents." But while Duette was alleged to have acted on a personal grudge against appellant, no such allegation is made against Tom.

While a public employee's immunity for misrepresentation is qualified, the immunity of a public entity for misrepresentation by its employee, whether intentional or negligent, is absolute. (Gov. Code, § 818.8; see *Harshbarger v. City of Colton* (1988) 197 Cal.App.3d 1335, 1340–1341 (*Harshbarger*) [municipality immune from liability for fraudulent building inspections].) Thus, under *Harshbarger*, the County is absolutely immune.

Because the complaint does not state facts showing actual malice or corruption by Tom, and appellant's briefs on appeal do not indicate that he can amend to allege such facts, the demurrer as to Tom was properly sustained without leave to amend under Government Code section 822.2. As to the County, the demurrer was properly sustained under Government Code section 818.8.

IV

Appellant also mounts a general constitutional challenge to "sovereign immunity." He argues that sovereign immunity as applied in California violates equal protection, failing to acknowledge that the constitutionality of the Act has been repeatedly upheld. (See e.g. *McAllister v. South Coast Air Quality etc. Dist.* (1986) 183 Cal.App.3d 653, 656–661; *Stone v. State of California* (1980) 106 Cal.App.3d 924, 930–931; *Stanley v. City and County of San Francisco* (1975) 48 Cal.App.3d 575, 580–581; see also *Martinez v. California* (1980) 444 U.S. 277, 283 & fn. 6.)

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.