Filed 12/13/12 Jones v. Maximus Developing CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KENNETH STANLEY JONES, Plaintiff and Appellant, v. MAXIMUS DEVELOPING, INC., et al., Defendants and Respondents.	B236439 (Los Angeles County Super. Ct. No. GC044707)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jan A. Pluim, Judge. Reversed.

James Ellis Arden for Plaintiff and Appellant.

Murphy Rosen Meylan & Davitt, Vincent J. Davitt, Anita Jain for Defendants and Respondents.

Kenneth Jones appeals from the dismissal of his complaint against respondents All California Mortgage Fund, LLC, Richard Berger, and David Alan Levinson and Joan Pearl Levinson, Trustees of the Levinson Family Trust, after respondents' demurrer was sustained without leave to amend. We reverse.

Factual[1] and Procedural Summary

This is a suit on a mechanic's lien.

Appellant is a contractor. In September of 2006, he was hired by a developer called Maximus Developing, Inc., to perform grading work on a multi-home project in Pasadena, the Kinnola Mesa Estates.

On November 25, 2009, appellant filed a notice of claim of mechanic's lien in the amount of $2.65 million. On February 23, 2010, he filed a complaint for foreclosure of the lien, naming as defendants Maximus Developing, Inc., as owner of Kinnola Mesa Estates, and Doe defendants, and alleging, on information and belief, that Maximus was the owner of the property. Maximus did not answer.

On April 6, 2010, appellant filed an amended mechanic's lien, changing the amount to $1.68 million.

On August 12, 2010, appellant filed a lis pendens.

On February 1, 2011, appellant filed a first amended complaint, naming approximately 80 additional defendants, including respondents, alleging that each

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[1] Because this case comes to us on judgment after demurrer was sustained without leave to amend, the relevant facts are those found in the complaint's properly pleaded or implied factual allegations, which we assume to be true. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) In their brief, respondents cite evidence which was the subject of their request for judicial notice in the trial court, apparently not granted, to the effect that they obtained their interest in the property on various dates in August 2007, and that numerous other investors obtained an interest about the same time. Respondents also cite evidence proffered with their motion to dismiss in this court, to the effect that they and other investors foreclosed on their lien through a credit bid on August 19, 2010. None of this evidence is properly before us on this appeal.

defendant was the owner of, or claimed some legal interest in, the property. Not all the new defendants were served with the complaint, but respondents were.

Respondents[2] demurred. The court sustained the demurrer without leave to amend on the ground of statute of limitations, ruling that "Plaintiff's original Complaint, which named Does 1-100 was filed within the 90-day Statute of Limitations set forth in Civil Code Section 3144. However, moving defendants were not named as [D]oes. Rather, they were ADDED as new defendants in the First Amended Complaint. The filing of the First Amended Complaint does not relate back to the filing of the original Complaint with respect to these defendants."

Appellant moved under Code of Civil Procedure section 473, subdivision (b), asking that the court vacate its ruling on the demurrer, and allow him to withdraw his first amended complaint and reinstate his original complaint. The motion was accompanied by, inter alia, the declaration of appellant's counsel to the effect that the decision to name respondents and the other new defendants as new defendants, rather than as Doe defendants, was his alone.

The court denied the motion on July 19, 2011,[3] and set an OSC re dismissal for August 16, 2011.[4] On that date, the court dismissed the case "in its entirety" with prejudice. The court also ordered respondents to give notice. On September 16, 2011, the court signed the judgment of dismissal prepared by respondents, which stated that the action was dismissed as to respondents. On September 21, defendants served Notice of Entry of the September 16 judgment. About a week later, on September 28, respondent

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[2] An additional defendant, George Moorvartian, answered. He incorporated respondents' demurrer into his answer.

[3] The minute order is not found in appellant's appendix, but is attached to respondents' brief. We deem this a request for judicial notice of the order, and grant the request.

[4] Respondents err when they assert, in their brief on appeal, that the July 19, 2011 order dismissed them from the action. Nothing in that order so states.

served another notice, this one stating that the action was dismissed against all defendants on August 16, 2011, and attaching a copy of the August 16, 2011 minute order.

On September 30, 2011, appellant filed his notice of appeal from the judgment.

In this court, respondents moved to dismiss on the grounds of mootness, proffering evidence that on March 1, 2012, they and the other owners sold the property to an entity called TL Property and arguing, inter alia, that sale meant that this litigation was moot. We denied the motion, finding that "The first amended complaint's prayer for relief can be read to seek to impose a personal judgment against defendants. Further, the prayer for relief seeks to recover moneys paid in connection with a sale of the property. A plaintiff in a mechanic's lien action can seek a personal judgment."

Discussion

1. Respondents' arguments

Because it addresses our jurisdiction, we begin with respondents' argument that the notice of appeal is fatally defective in that it fails to identify the "particular judgment or order being appealed" from. (Cal. Rules of Court, rule 8.100, subd. (a)(2).)

The notice of appeal specifies that the appeal is from "judgment of dismissal after an order sustaining a demurrer." Respondents contend that this notice does not distinguish between the ruling on appellant's Code of Civil Procedure section 473 motion, the dismissal of the action as to all parties, per their second notice of entry of judgment, and what they call the "demurrer judgment," a phrase which has no legal meaning, but which they describe as "based on May 26, 2011 Demurrer order and entered on September 16, 2011."

We see no flaw in the notice of appeal. This case was dismissed by the court on August 16, 2011, and the notice of appeal clearly states that the appeal is from the judgment of dismissal. The fact that respondents gave two notices of entry of judgment does not render the notice of appeal defective.

Respondents also raise arguments concerning the effect of the dismissal on the other defendants named in the first amended complaint, who were not served, did not demur, and are not before us. We do not adjudicate the rights of parties not before us, and see nothing in those arguments which presents a barrier to the resolution of this appeal.

Finally, respondents argue that this appeal is moot, repeating arguments found in their motion to dismiss, a motion which we have already denied. We do not further address those arguments.

2. The trial court ruling

We find that the trial court erred when it sustained the demurrer, whether or not the relation back doctrine applied. (See 10 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 28:69 [mechanic who lacks actual knowledge that a person has an interest within 90-day filing period can amend the complaint after the period has expired in order to name new defendant, and the amendment relates back and is considered timely filed as to newly named defendant].)

That is because Code of Civil Procedure section 474, which allows a plaintiff who is ignorant of the name of a defendant to sue Doe defendants, applies to mechanic's lien actions. (*Sobeck & Associates, Inc. v. B & R Investments No. 24* (1989) 215 Cal.App.3d 861, 867; *Westfour Corp. v. California First Bank* (1992) 3 Cal.App.4th 1554.)

"The general rule is that an amended complaint that adds a new defendant does not relate back to the date of filing the original complaint and the statute of limitations is applied as of the date the amended complaint is filed, not the date the original complaint is filed. [Citations.] A recognized exception to the general rule is the substitution under section 474 of a new defendant for a fictitious Doe defendant named in the original complaint as to whom a cause of action was stated in the original complaint. [Citations.] If the requirements of section 474 are satisfied, the amended complaint substituting a new defendant for a fictitious Doe defendant filed after the statute of limitations has expired is

deemed filed as of the date the original complaint was filed. [Citation.]" (*Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 176.)

Further, ""the courts of this state have considered noncompliance with the party substitution requirements of section 474 as a procedural defect that could be cured and have been lenient in permitting rectification of the defect." (*Woo v. Superior Court, supra,* 75 Cal.App.4th at p. 177.)

The court thus erred when it failed to permit appellant to amend the complaint, to name the new defendants as Doe defendants, under Code of Civil Procedure section 474.

In so ruling, we are mindful of the fact that the purpose of the mechanic's lien, the only creditors' remedy which stems from a constitutional command, is to prevent unjust enrichment of a property owner at the expense of a laborer whose work enhanced the value of the property, and that courts '"have uniformly classified the mechanics' lien laws as remedial legislation, to be liberally construed for the protection of laborers and materialmen.' [Citation.]" (*Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 462; *Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882, 889; *Abbett Electric Corp. v. California Fed. Savings & Loan Assn.* (1991) 230 Cal.App.3d 355, 360.) Recovery in a mechanic's lien case should not be foreclosed by a technical, procedural defect.

3. Other grounds

Respondents argue that appellant cannot prevail on appeal because he cannot amend his complaint to avoid the limitations bar of Civil Code section 8460, which provides that an action to enforce a lien must be commenced within 90 days of the time the lien is recorded. They acknowledge that appellant's initial complaint was timely filed within 90 days of recordation of the lien. However, they contend that when appellant filed an amendment to his lien (changing only the amount) the amended lien "superseded" the original lien, so that appellant had 90 days from the amended lien to file a new complaint. They then point out that the first amended complaint was filed more than 90 days after the amended lien, and contend that it was untimely. In support of this

theory, respondents cite only Civil Code section 8460, which does not concern itself with amendment to a lien or provide that an amended lien "supersedes" a lien.

We cannot accept respondents' interpretation of the statute. Logically extended, respondents' argument is that after amending a lien, a claimant must file a new complaint, but we see no such requirement in the statutory scheme. Nor would such a reading make much sense, given that a mistake concerning the amount specified in a lien does not invalidate the lien (10 Miller & Starr, *supra*, § 28:69), and given that, in any event, "[t]he actual amount due on the lien presents a question of fact for the trial court." (*Basic Modular Facilities, Inc. v. Ehsanipour* (1999) 70 Cal.App.4th 1480, 1485.)

Disposition

The judgment is reversed. Appellant to recover costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.