Filed 8/23/12 Superior Coatings v. LA Unif. School Dist. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SUPERIOR COATINGS, INC., Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	B232750 (Los Angeles County Super. Ct. No. BC448774)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

Brentwood Legal Services and Steven L. Zelig for Plaintiff and Appellant.

Murphy & Evertz, John C. Murphy, Douglas J. Evertz and Brad B. Grabske for Defendants and Respondents.

Plaintiff and appellant Superior Coatings, Inc. (Superior) appeals a judgment of dismissal following the sustaining of a demurrer to its original complaint without leave to amend. The demurring defendants and respondents are Los Angeles Unified School District (the District), Marguerite Poindexter LaMotte (LaMotte), Terrence Fennessey (Fennessey), Rod Hamilton (Hamilton), Mort Bernstein (Bernstein) and Benjamin Rodriguez (Rodriguez) (sometimes collectively referred to as the District).

Superior sued the District for alleged damages arising out of the District's construction and planned operation of a school on a site adjacent to Superior's premises.[1]

We conclude the trial court properly sustained the District's demurrer to the original complaint without leave to amend because the pleading reflected on its face that it was incapable of being amended to state a cause of action. Therefore, the judgment of dismissal is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The tort claim.*

On November 3, 2010, Superior presented a governmental tort claim to the District. The claim stated in pertinent part:

Superior is a large volume paint wholesaler, located at 8700 Mettler Street in Los Angeles, within an industrial area. Among other things, Superior mixes large quantities of paint, including volatile organic compounds (VOC's) that are within acceptable health risk thresholds for an industrial area. The District had purchased an adjacent site and Superior believed the District's planned construction of a school on the site would impact Superior's operations by prohibiting it from engaging in the activities which emit VOC's. Superior also was concerned the District will contend that odors and

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[1] At oral argument, this court was advised the school has been completed and was scheduled to open in August 2012.

other emissions from Superior would interfere with the operation of the school, and that the District would seek to limit or shut down Superior's operations.[2]

2. *Superior commenced this lawsuit against the District one day after presenting its governmental tort claim*.

On November 4, 2010, one day after Superior submitted its tort claim, it filed this action against the District for damages. The named defendants, in addition to the District, were LaMotte, Fennessey, Hamilton, Bernstein and Rodriguez, who were sued as employees or agents of the District.

The complaint purported to set forth three causes of action: "nuisance & trespass" (first cause of action); inverse condemnation (second cause of action); and violation of civil rights (third cause of action).

The gravamen of the lawsuit was that the District's construction activity would generate dust, noise, traffic and other harms amounting to a nuisance, and that the District's operation of the school would impair Superior's ability to use its premises, amounting to a taking of Superior's property without just compensation.

3. *Demurrer*.

The District demurred to the original complaint in its entirety. It asserted, inter alia: (1) the cause of action for nuisance/trespass was barred by Superior's failure to comply with the government claims statute (Gov. Code, § 945.4); (2) the cause of action for inverse condemnation was not ripe for adjudication in that the complaint merely anticipated that at some point in the future, the school might force the closure of Superior's operations; and (3) the civil rights claim was purely conclusionary and failed to state any facts to show how the defendants deprived Superior of its civil rights.

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[2] Although Superior contends that environmental contaminants are migrating from the school site to Superior's property, that issue was not enumerated in the tort claim which it presented to the District. We note that in the opening brief, at footnote one, Superior withdrew its cause of action for trespass against the District.

4. *Hearing and trial court's ruling sustaining demurrer to original complaint without leave to amend.*

On March 3, 2011, the matter came on for hearing. The trial court noted Superior had not filed an opposition to the demurrer, nor had it filed a first amended complaint. Rather, Superior merely had filed an "intent to file a first amended complaint." The trial court then announced its ruling as follows:

Pursuant to Civil Code section 3482, the District's construction of a school could not be deemed a nuisance.[3] Further, the trespass claim, which was "thrown together" with the nuisance claim, failed because there was no allegation of any entry. Moreover, there was no compliance with the governmental claim requirement.

As for the second cause of action, inverse condemnation, it was not ripe because "nothing has happened yet. There's been no taking on the alleged condemnation."

As for the third cause of action, deprivation of civil rights, "there is no cause of action for violation of 42 U.S.C. [section] 1983 under these circumstances." As to the individual defendants, "there were no allegations at all in the complaint regarding individuals. [¶] The closest we get to any allegation regarding the individuals is contained in paragraph 11," charging the District's employees with misusing their business cards. "I have failed see anything in [42 U.S.C section] 1983 regarding misutilization of business cards."

Superior's counsel requested to be heard. The trial court responded, "you can't be heard unless you filed an opposition. . . . [T]he rule is, if you don't file an opposition, you don't get the opportunity to be heard." Superior's counsel stated, "we filed a notice to amend on February 17th, and we've been in the process of draft[ing]." The trial court

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[3] Civil Code section 3482 states: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

ruled there was no authority for the filing of a notice of "*intent to amend*," and that counsel's reliance on Code of Civil Procedure section 472 was misplaced.[4]

The trial court sustained the demurrers to all causes of action without leave to amend, concluding "There is no opposition. There is no first amended complaint. The case is dismissed."

5. *Subsequent proceedings*.

Following the trial court's order sustaining the demurrer without leave and dismissing the action, Superior filed a motion to allow the filing of a first amended complaint. (§ 473.) The motion was supported by counsel's affidavit of fault, stating the failure to file a first amended complaint prior to the hearing on the demurrer was due to miscommunication within the firm. The moving papers also included a proposed first amended complaint.

The District opposed the motion, arguing the March 3, 2011 dismissal rendered the request for leave to amend procedurally improper. Further, reconsideration was not warranted because Superior failed to present any new facts or law. Further, the trial court properly sustained the demurrer without leave to amend because the complaint did not, and could not, state facts sufficiently to establish a proper cause of action. The trial court's ruling was based on the merits of the demurrer, not on Superior's failure to oppose the demurrer. Therefore, relief under section 473 would be improper.

On April 20, 2011, the trial court heard and denied Superior's motion. With respect to the merits of the claims, the trial court stated to Superior's counsel: "When you get a real justiciable issue, bring it back and file it. Right now it's just theoretical.

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[4] All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

Section 472 provides in pertinent part: "Any pleading may be amended once by the party of course, and without costs, *at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon*, by filing the same as amended and serving a copy on the adverse party . . . ." (Italics added.) However, as the trial court noted, section 472 does not provide for the filing of a "notice of intent to amend" as an alternative to the filing of an amended complaint.

There's nothing to adjudicate. The trial court noted the case already had been dismissed as of March 3, 2011, at the time it sustained the demurrer without leave to amend; however, the formal order of dismissal was not been entered at that time. The trial court then signed the order of dismissal, stating "Consider it nunc pro tunc back to the date when we entered it originally, to the hearing date."

Judgment of dismissal was entered on April 20, 2011. This timely appeal followed.

CONTENTIONS

Superior contends: its original complaint was well pled; the trial court erred in sustaining the demurrer to the original complaint without leave to amend; the trial court acted in a "draconian" manner with respect to Superior's "notice of intent to file a first amended complaint"; the trial court erred in refusing to accept the proposed first amended complaint and in concluding the controversy in question was not justiciable; and the trial court erred in not granting mandatory relief under section 473.

DISCUSSION

1. *Standard of appellate review.*

In determining whether a plaintiff has properly stated a claim for relief, "our standard of review is clear: ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 (*Zelig*).)

Generally, when a demurrer "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." (*Zelig, supra*, 27 Cal.4th at p. 1126.)

However, where, as here, a demurrer is sustained to the *original* complaint, denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment. (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 877.)

Our review is de novo. (*Zelig, supra,* 27 Cal.4th at p. 1126.)

2. *Procedural issues.*

a. *Superior failed to avail itself of section 472; it did not file a first amended complaint prior to the hearing on the demurrer to the original complaint; therefore, the original complaint is the operative complaint.*

Section 472 states: "Any pleading may be amended once by the party of course, and without costs, *at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon,* by filing the same as amended and serving a copy on the adverse party . . . ." (Italics added.)

Here, Superior did not file any opposition to the demurrer, nor did it file a first amended complaint prior to the March 3, 2011 hearing on the demurrer. Instead, it merely filed a paper indicating its "intent to file a first amended complaint."

Because Superior did not file a first amended complaint prior to the hearing on the demurrer, the trial court properly resolved this case pursuant to the District's demurrer to the original complaint, which was the operative complaint in this action.

b. *Superior was not entitled to mandatory relief from its failure to file an amended complaint prior to the hearing on the demurrer; the trial court properly refused to entertain the proposed first amended complaint after it sustained the demurrer to the original complaint without leave to amend.*

After the trial court sustained the demurrer to the original complaint without leave to amend, Superior filed a motion to allow the filing of a first amended complaint. Its motion was supported by counsel's affidavit of fault, pursuant to section 473(b). Counsel took full responsibility for failing to file a first amended complaint prior to the hearing on the demurrer and attributed the problem to miscommunication within the firm.

Superior contends it was entitled to mandatory relief, based on counsel's affidavit of fault, and therefore the trial court erred in denying Superior's motion under section 473(b), to allow the filing of its first amended complaint. The argument fails.

The mandatory relief provision of section 473(b), based on an attorney's affidavit of fault, require the court, if certain prerequisites are met, to vacate a "*default*," a "*default judgment*," or a "*dismissal*." (*English v. IKON Business Solutions, Inc*. (2001) 94 Cal.App.4th 130, 143 (*English*).) In this context, the word "dismissal" is construed as having a limited meaning similar to the term "default judgment." (*Id*. at p. 145.) In adding the word "dismissal" to the mandatory provision of section 473(b), "the Legislature 'intended to reach *only those dismissals which occur through failure to oppose a dismissal motion*--the only dismissals which are procedurally equivalent to a default. [Citation.]" (*English, supra,* at p. 145, italics added.)

Thus, various decisions have "construed the word 'dismissal' in the mandatory provision of section 473(b) as having a limited meaning, to prevent that provision 'from being used indiscriminately by plaintiffs' attorneys as a "perfect escape hatch" [citation] to undo dismissals of civil cases.' [Citation.] Thus, we have held that the mandatory provision does not apply to: (1) a dismissal following the sustaining of a demurrer without leave to amend on the ground the statute of limitations had run [citation]; (2) a voluntary dismissal pursuant to a settlement agreement [citation]; and (3) a mandatory dismissal for failure to serve a complaint within three years [citation]." (*English, supra*, 94 Cal.App.4th at pp. 145-146.)

In the instant case, Superior relied on counsel's affidavit of fault to excuse its failure to file a timely first amended complaint, prior to the hearing on the demurrer to the original complaint. Because the nature of said proceeding was a demurrer, not a motion for involuntary dismissal, the mandatory relief provision of section 473(b) has no application here.

Therefore, the trial court properly refused to entertain the proposed first amended complaint, belatedly proffered by Superior after the trial court sustained the District's demurrer to the original complaint without leave to amend.

3. *Review of the original complaint, which is the operative complaint, indicates it was incapable of being amended to state a cause of action.*

a. *Superior's noncompliance with Tort Claims Act is fatal to its first cause of action for "nuisance/trespass"; Superior is incapable of amending its complaint to state a cause of action in tort.*[5]

"Before suing a public entity, the plaintiff must present a timely written claim for damages to the entity. (Gov. Code, § 911.2; . . . .)" (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 208 (*Shirk*).) A complaint that does not allege facts demonstrating either that a claim was timely presented, or that compliance with the claims statute is excused, is subject to a general demurrer for not stating facts sufficient to constitute a cause of action. (*Id*. at p. 209.)

The purpose of the claims statutes "is to provide the public entity sufficient information to enable it to adequately investigate claims *and to settle them, if appropriate, without the expense of litigation*. [Citations.]" (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 455, italics added.) *"Only after the public entity's board has acted upon or is deemed to have rejected the claim* may the injured person bring a lawsuit alleging a cause of action in tort against the public entity. [Citations.]" (*Shirk, supra*, 42 Cal.4th at p. 209, italics added.)

Here, Superior presented its claim to the District on November 3, 2010, and filed this lawsuit the next day. Under the statutory scheme, the District was entitled to 45 days to consider the claim. (Gov. Code, § 912.4.) By "jumping the gun" in filing this lawsuit, Superior deprived the District of the opportunity to resolve this matter without the expense of litigation. Simply stated, Superior's hasty commencement of this action completely negated the claims statute.

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[5] We are mindful the Tort Claims Act does not apply to Superior's cause of action for inverse condemnation (Gov. Code, § 905.1; *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 607) or to its federal civil rights claim. (*Williams v. Horvath* (1976) 16 Cal.3d 834, 842.)

Superior asserts that in December 2010, the District denied the claim, and therefore Superior now is capable of amending its pleading to allege compliance with the claims statutes. The contention is meritless. To reiterate, "[*o*]*nly after the public entity's board has acted upon or is deemed to have rejected the claim* may the injured person bring a lawsuit alleging a cause of action in tort against the public entity. [Citations.]" (*Shirk, supra*, 42 Cal.4th at p. 209, italics added.) Because Superior sued prematurely -- before the District had any opportunity to consider the claim, and the claim was denied during the pendency of this lawsuit, Superior is incapable of alleging it brought suit *after its claim was rejected or denied by operation of law.*

In sum, because Superior is incapable of alleging compliance with the Tort Claims Act, the first cause of action for nuisance/trespass was not well pled and cannot be amended to state a cause of action.

b. *Second cause of action for inverse condemnation not well pled.*

(1) *General principles.*

An inverse condemnation cause of action derives from article I, section 19 of the California Constitution, which states in relevant part: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to, or into court for, the owner." Property "is 'taken or damaged' within the meaning of article I, section 19 of the California Constitution, so as to give rise to a claim for inverse condemnation, when: (1) the property has been physically invaded in a tangible manner; (2) no physical invasion has occurred, but the property has been physically damaged; or (3) an intangible intrusion onto the property has occurred which has caused no damage to the property but places a burden on the property that is direct, substantial, and peculiar to the property itself. [Citations.]" (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 530, italics omitted.) The property owner has the burden of establishing that the public entity has, in fact, taken or damaged his or her property. (*San Diego Gas Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 940.)

(2) *Superior's claim it will be put out of business is not ripe.*

Superior pled "once the school opens, Superior will be shut down on nuisance odor grounds, thereby allowing [the District] to avoid the provision of just compensation. This is a form of inverse condemnation." Superior asserted the District "will attempt to cause its closure, or limit its operations, once the school is occupied," and that the District would "seek to impose severe restrictions on the manufacturers operating in such close proximity to the school such as Superior, and that the value of the real and personal property including fabrication equipment and systems and the business will plummet. There will be a loss of goodwill. There will be a need for relocation. There will be a need for other compensation relative to the limitations that will be placed if the construction of the school and operation of the school actually occurs."

The above allegations are purely speculative – they purport to anticipate damages that Superior *may suffer* at some point in the future. In an inverse condemnation action, the property owner must first clear the hurdle of establishing that the public entity *has, in fact, taken or damaged his or her property* before he or she can reach the issue of just compensation. (*San Diego Gas & Electric Co. v. Superior Court, supra,* 13 Cal.4th at p. 940.) Superior's speculation that the school may impair Superior's business operations in the future does not amount to a damaging or taking under the law of inverse condemnation.

(3) *Other impacts of school construction on Superior's operations.*

At oral argument on appeal, in response to an inquiry by the panel, Superior's counsel asserted the "best fact" in support of its inverse condemnation claim was the District's alleged interference with Superior's use of the property as a result of traffic blockage stemming from the construction activity.

By way of background, a "landowner enjoys an easement of access which permits travel onto the street upon which his land abuts, and from there, in a reasonable manner, to the general system of public streets. [Citations.] Such an easement constitutes a property right [citations], the substantial impairment of which is cognizable in an eminent domain proceeding. [Citation.] [¶] *The determination whether the interference with*

access constitutes a substantial impairment is a question of law; if compensable impairment is found, then the extent of such impairment is a matter of fact for determination by the jury. [Citation.] In making the determination whether there is a substantial impairment of defendant's access to the general system of public streets and public highways, our inquiry is tantamount to determining whether her right of access has been unreasonably interfered with. [Citations.]" (*People ex rel. Dept. Pub. Wks. v. Romano* (1971) 18 Cal.App.3d 63, 72-73, italics added (*Romano*).)

Romano applied the test of substantial impairment to its fact situation and concluded there had been no such impairment. (*Romano, supra*, 18 Cal.App.3d at p. 73.) *Romano* observed, inter alia, "assuming that new Meridian Road is relevant to the context of impairment of access to the general system of public streets, the record discloses that defendant is caused, at most, to travel a distance of 2,400 feet from her home to the nearest available entry into new Meridian Road." (*Ibid*.; accord *People ex rel. Dept. of Public Works v. Wasserman* (1966) 240 Cal.App.2d 716, 730 [alternate route which was one-third of a mile longer after the construction of the improvement did not constitute a substantial impairment of the defendants' access to general system of public streets].)

Thus, as the Supreme Court stated in *People v. Ayon* (1960) 54 Cal.2d 217 (*Ayon*), "the right of a property owner to ingress and egress is not absolute. He cannot demand that the adjacent street be left in its original condition for all time to insure his ability to continue to enter and leave his property in the same manner as that to which he has become accustomed." (*Id*. at p. 223.) Temporary "injury resulting from actual construction of public improvements is generally noncompensable. Personal inconvenience, annoyance or discomfort in the use of property are not actionable types of injuries. [Citations.] 'It would unduly hinder and delay or even prevent the construction of public improvements to hold compensable every item of inconvenience or interference attendant upon the ownership of private real property because of the presence of machinery, materials, and supplies necessary for the public work which have been placed on streets adjacent to the improvement.' [Citation.]" (*Id*. at p. 228.)

Here, with respect to the issue of ingress and egress, Superior merely pled the construction activity damaged its property by "impairing ingress and egress to plaintiffs' properties" and by "impairing pedestrian and automobile access to the property." Thus, Superior did not allege that access to its property had been eliminated. To the contrary, the pleading reflected that access, although impaired, was ongoing. "As long as there is access to the abutting road and from there to the next intersecting street in at least one direction, there is no legally cognizable impairment of access." (*Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1557, citing *Ayon*, *supra*, 54 Cal.2d at pp. 223-224.)

In sum, Superior failed to allege facts showing that its right of access was substantially impaired by the District's construction activity. Therefore, Superior failed to plead a cause of action for inverse condemnation based on impaired access to its premises.

c. *Third cause of action for alleged violation of civil rights likewise is infirm.*

As stated in *Breneric Associates v. City of Del Mar* (1998) 69 Cal.App.4th 166, 180, "A plaintiff seeking recovery under [42 U.S.C.] section 1983 must plead more than constitutional 'buzzwords' to survive demurrer. [Citation.] The plaintiff must allege specific and nonconclusory facts showing the defendant's acts deprived him of a right, privilege or immunity secured by the federal Constitution or federal laws. [Citation.]"

Here, Superior's third cause of action cited (1) the 14th Amendment of the United States Constitution, (2) article I, section 1 of the California Constitution, and (3) 42 United States Code sections 1983 and 1988. Superior then alleged, in purely conclusionary language, that defendants acted under color of state law in their official capacities to violate Superior's rights. The third cause of action was devoid of factual allegations. As the trial court observed, Superior merely pled (at para.11) that the District acted "by and through its employees and agents," who presented their business cards to members of the public "that identified said individuals as employees of [the District]," when in fact said individuals were employed by others.

We note that elsewhere in the complaint, Superior challenged the environmental review which was conducted, claiming the defendants engaged in violations of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) in order to obtain approval of the project. Superior claims the District failed to conduct a proper environment review in accordance with CEQA and that the final Environmental Impact Report (EIR) "lacked a proper nuisance potential evaluation."

However, Superior cannot predicate its federal civil rights claim on a CEQA violation. Judicial review of an alleged CEQA violation would have been by way of a timely petition for writ of mandate to set aside the approval of the EIR and the project. (Pub. Resources Code, § 21167; see, e.g. *LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675, 677-678.) Where the EIR has been certified, Public Resources Code "section 21167.2 mandates that the EIR be conclusively presumed valid unless a lawsuit has been timely brought to contest the validity of the EIR. This presumption acts to preclude reopening of the CEQA process even if the initial EIR is discovered to have been fundamentally inaccurate and misleading in the description of a significant effect or the severity of its consequences. After certification, the interests of finality are favored over the policy of encouraging public comment." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1130.)

Here, the Notice of Determination in compliance with Public Resources Code sections 21152 and 21108 was filed on February 28, 2008. Superior then had 30 days to file a petition to challenge the final EIR. (Pub. Resources Code, § 21167, subd. (c).) It did not do so. At this juncture, the final EIR is "conclusively presumed" to be valid. (*Id*. § 21167.2.) Superior's present challenge to the sufficiency of the environmental review is an improper attack on the validity of the final EIR.

We conclude Superior is incapable of amending its pleading to state a civil rights claim predicated on an alleged CEQA violation by the District.

DISPOSITION

The judgment of dismissal is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J