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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

INGA DIATCHKOVA, Plaintiff and Appellant, v. NATIONAL BANK OF CALIFORNIA, Defendant and Respondent.	B268331 (Los Angeles County Super. Ct. No. BC506411)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed.

Norton & Associates and Timothy L. Norton for Plaintiff and Appellant.

Friedemann Goldberg, John F. Friedemann and Marci A. Reichbach for Defendant and Respondent.

Plaintiff and appellant Inga Diatchkova appeals from a judgment of dismissal entered following an order granting summary judgment in favor of defendant and respondent National Bank of California (the Bank) in this construction defect action. The trial court found Diatchkova's amended complaint, which substituted the Bank as a Doe defendant and added allegations of negligence, did not relate back to the original complaint, because Diatchkova was not genuinely ignorant of the Bank's identity or the facts rendering the Bank liable when she filed her action. As a result, her complaint was barred by the statute of limitations. On appeal, Diatchkova contends her amended complaint relates back to her original complaint under Code of Civil Procedure section 473,[1] because the original and amended complaints arose from the same general set of facts, and in any event, she was not aware that the Bank had acted outside its role as a lender and participated in disclosures about the property until she received documents

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

during discovery. We conclude the undisputed facts show Diatchkova was sufficiently aware of the Bank's role in the transaction to have named the Bank as a defendant when the complaint was initially filed, and therefore, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Construction Defects Revealed

On September 20, 2010, Diatchkova purchased a newly constructed three-story home in the Hollywood Hills from seller 2746 Rinconia LLC (Rinconia). Diatchkova was represented in the transaction by David Kessler of Sotheby's International Realty. Diatchkova's business affairs manager Vincent Bouvier was authorized to act on her behalf with respect to all matters pertaining to the property. Rinconia was represented by Matt Reeser of Century 21. The seller's questionnaire did not disclose any known defects or repairs.

Diatchkova moved into the home in December 2010. When it rained the following day, water leaked into the home in two hallways, the elevator, and the living room. There was so much water in one hallway, it was as if someone had turned on a hose. Water also leaked from a bathtub on the second floor. Contractor Chuck Azzuz of BSC Development, Inc., who was involved with the construction of the home, made some repairs.

On March 9, 2011, Azzuz sent an e-mail to Kessler acknowledging three items that required repair at the

house—a wooden step, tile, and interior door locks. He copied an individual named Ayin Aleph on the message. He noted that Aleph had complaints about hairline cracks in the drywall, but he explained that the hairline cracks were normal settlement for a hillside property.

Aleph responded to Azzuz that there were other items that needed repair, including problems with additional locks, missing grout, a leak near the elevator, a leak in the swimming pool, and paint bubbling in one of the garages, possibly from water damage. Several photos were attached.

After multiple discussions, Azzuz asked Bouvier, Kessler, and Aleph to send a comprehensive list of needed repairs. On March 23, 2011, Bouvier sent a list of 41 items that he believed were construction defects to be repaired, including numerous cracks, a leak from the swimming pool, loose tiles, missing grout, and an interior leak. Azzuz informed Bouvier that he was not the main contractor for the project.

Bouvier asked Reeser for the seller's e-mail address on March 31, 2011. Reeser said the person to ask about vendors who performed work on the house was Perri Lee. He provided Lee's e-mail address. Bouvier informed Lee about the defects. He asked for the name of the person responsible for the work on the house, since Azzuz said he was not the main contractor for the project.

On April 2, 2011, Lee explained by e-mail that the former owner of the property faced a financial crisis in 2008. "Along with the depreciation of the future valuation of the

property and possible legal actions brought [against general contractor] Bluesteel construction at the time, I, as the representative of both entity, and investors who provided construction guaranty for the construction loan, were brought into the bank. Upon numerous and amicable meetings, we [came] to a settlement. The settlement entailed additional release of the fund in the amount of $500,000 USD and relinquishing our rights and responsibility of the property to the bank. [¶] The bank selected to hire Henry [Homsher] as the project manager and he has selected Chuck [Azzuz] as the new General Contractor to provide construction services to finish the project." Lee explained that Bluesteel had ceased operations after 2008. Bluesteel's construction license was cancelled along with the performance bond. "The bank, Henry and Chuck are very aware of the circumstances of our settlement . . . with the bank and in fact, Henry and Chuck was brought into continue the construction work Bluesteel Construction was no longer legally allowed to pursue."

Bouvier wrote an e-mail to Azzuz on April 3, 2011, copied to Kessler, Reeser, and Aleph, which stated in pertinent part, "Lee states you have been appointed General Contractor by the bank so you should know who has painted the stucco and the inside of the house." Azzuz replied to Bouvier, Homsher, Kessler, Reeser, and Aleph, that he knew the work required under his contract and planned to remedy three issues.

On April 5, 2011, Homsher, in his position as the President and CEO of Alternative Strategies, LLC, wrote to Bouvier. He stated that his role had been "to assist the borrowers when Mr. Lee was unable to complete the home. I worked with Sam Kim, Sun Kim and Perry Lee to contract Chuck to complete the home and garage. At the time Chuck agreed to assist in completing the home the stucco and drywall on the main house was complete. To enhance the home Chuck applied an elasticomeric paint to the stucco to change the color slightly and have it match the garage. [¶] Settling on hillside projects is normal and if you look at any smooth stucco structure a year or two after building you will find the cracks similar to what you are witnessing on Rinconia." He attached the information about Bluesteel's construction coverage that was provided to the bank for the loan. He copied Azzuz, Lee, and an individual named Bill Bowman, who is affiliated with the Bank.

On September 28, 2012, Bouvier wrote an e-mail to Homsher. He noted that "[t]he house was finished by your company . . . that hired Chuck Azzuz of BCS Development." He described several construction defects and his discussions with Azzuz. He asked, "I also would like to know which bank finished the job of this house and if there was a contract between the Bank and the new general contractor as to what was supposed to be achieved further that 2746 Rinconia LLC could not afford to go on on the project. [¶] We need that to understand the responsibility of each participant to this project."

On October 10, 2012, the Bank's attorney, John Friedemann, wrote to Bouvier and Diatchkova. He stated, "This firm represents National Bank of California ('NBCAL') and we have been asked on its behalf and on behalf of Mr. Homsher to clarify certain misimpressions set forth in Mr. Bouvier's email [of September 28, 2012]." The attorney stated that the Bank hired Homsher, along with his company Alternative Strategies, as a consultant. Homsher had eventually been hired as the President and CEO of the Bank.

The attorney explained that Homsher introduced the former owners to Azzuz. "[T]he owners entered to a specific contract with Mr. Azzuz who agreed to take on certain specific tasks in connection with the completion of contraction at 2746 Rinconia Drive. Neither Mr. Homsher nor Alternative Strategies LLC was ever a party to any contract with the owners and neither had any responsibility to the owners whatsoever in connection with the project."

He stated that Homsher did nothing more than introduce Azzuz to the former owners. "Mr. Azzuz was never hired by Mr. Homsher, Alternative Strategies LLC or [the Bank]. Mr. Homsher recommended to [the Bank] that it fund part of the cost overruns in connection with the construction of the home at 2746 Rinconia Drive to get the project completed. The property at 2746 Rinconia Drive was never foreclosed upon by [the Bank] and [the Bank] never had any control over the construction process. Statements by Mr. Perri Lee that he relinquished rights and

responsibilities to [the Bank] are utterly false as are his claims that Mr. Homsher ever served as a 'project manager' or 'selected Chuck as the new General Contractor.' [¶] Thus, there was no bank which 'finished the job of this house' and there was no 'contract between the Bank and the new general contractor.'" He denied any responsibility for remediation by Homsher or the Bank, and he directed all further communications with them to go through him. Bouvier acknowledged receipt of the message.

The Instant Lawsuit

On April 18, 2013, Diatchkova, individually and as trustee of The Vladimir Kupenko Trust, filed the complaint in the instant action against several defendants, including the former owners, Lee, Bluesteel, Azzuz, and Does 1 through 25. With respect to the Doe defendants, Diatchkova alleged in pertinent part, "The true names or capacities, whether individual, corporate, associate or otherwise, of Defendants named herein fictitiously as DOES 1 through 25 inclusive, are unknown to Plaintiff at this time. Plaintiff is informed and believes and based thereon alleges that each of the Defendants sued herein as a DOE is in some way liable or responsible to Plaintiff for defective conditions of the Property and/or the occurrences set forth in this complaint. Said Defendants include corporations, partnerships, and individuals who were builders, developers, sellers, owners, general contractors, subcontractors, architects, design

professionals, engineers, material manufacturers or suppliers in connection with the Property, or who were otherwise engaged in selling, constructing, designing, specifications, surveying, planning, developing, or improvement of the Property. When the true names or capacities of these Defendants become known to Plaintiff, Plaintiff will seek leave to amend this Complaint to insert the same." The causes of action alleged against Doe defendants 16 through 25 were non-disclosure of material facts by the seller, violation of Civil Code section 1102, and negligent misrepresentation.

On May 15, 2014, Diatchkova filed an amendment to the complaint stating that she had designated a defendant in the complaint by the fictitious name of Doe 16, because she had been ignorant of the defendant's true name. Having discovered the true name of the defendant to be National Bank of California, she substituted the true name for the fictitious name.

That same day, Diatchkova filed a motion requesting leave to file an amended complaint. She stated that she had recently discovered the involvement of parties whose identity could not have been known at the time the complaint was filed, as well as the existence of a cause of action and damages that were not known until May 2014. She stated that when the complaint was filed in April 2013, she knew the original developer had been unable to complete construction and Azzuz had completed the construction. She served discovery on the Bank and learned about the Bank's

participation in the completion and sale of the property, so she was seeking to add the Bank as a defendant. It was also necessary to plead additional facts, previously unknown to Diatchkova, to state a cause of action against the Bank. The facts supporting her request to amend the complaint were not known, and could not have been known, when the initial complaint was filed. Unless leave to amend was granted, Diatchkova would be deprived of her ability to seek redress from the Bank for its previously undisclosed role.

Diatchkova attached a copy of her proposed amended complaint. The amended complaint added allegations that the Bank, formerly sued as Doe 16, was the construction lender for construction of the structure. The causes of action for seller's non-disclosure of material facts, violation of Civil Code section 1102, and negligent misrepresentation in the amended complaint against the Bank were identical to the causes of action alleged against Doe 16 in the original complaint. A new cause of action for negligence was alleged against the Bank in the amended complaint, instead of the negligence cause of action against Doe 16 in the original complaint. The new allegations included that Rinconia had dissipated the loan proceeds, could not complete construction, and defaulted on the construction loan. The Bank acted beyond the scope of an ordinary lender by obtaining Azzuz's services to complete construction of the home. Azzuz entered into a contract with Rinconia, but the Bank selected and paid Azzuz. The Bank knew, or should have known, Azzuz employed unlicensed entities to perform

work, which failed and resulted in damage. The Bank knew the roof, decks, and stucco were not properly built. The Bank acted beyond the scope of an ordinary lender in its participation in the sale of the house to Diatchkova by paying for the staging of the house, among other things. Although the sales documents were signed by Rinconia, the Bank controlled the sale and received the proceeds. The Bank allowed Rinconia to procure a type of insurance policy that does not cover Diatchkova's claims. The Bank did not disclose to Diatchkova that more than one contractor was involved with construction, deficiencies were discovered and not properly repaired, and Rinconia did not have insurance to protect Diatchkova. Diatchkova discovered the Bank's involvement within the past year and could not reasonably have discovered it earlier.

No opposition to the motion is reflected in the appellate record. A hearing was held on June 11, 2014. There is no reporter's transcript of the hearing in the record on appeal. The minute order reflects that Diatchkova appeared, but there was no appearance by the Bank. The trial court granted the motion. On June 11, 2014, Diatchkova filed the amended complaint.

As of Diatchkova's deposition on June 8, 2015, there were still active leaks on the patio, in both garages, and the swimming pool on one side was rotten. On June 12, 2015, the Bank filed a motion for summary judgment on the grounds that it was not a proper Doe defendant and the statute of limitations had run on the causes of action against

the Bank before Diatchkova filed the amended complaint. The Bank argued that Diatchkova was aware of the Bank's identity and role in the transaction before the original complaint was filed, and admitted in the motion to amend the complaint that the original complaint did not state a cause of action against the Bank. The Bank submitted documents in support of the motion for summary judgment that established the undisputed facts above.

Diatchkova filed an opposition to the motion for summary judgment on several grounds. She argued that the first visible permanent damage occurred on October 11, 2012. She admitted that she knew the Bank was the construction lender, but argued that claims for construction defects are prohibited against lenders unless they act outside the normal role of a lender and she did not know the facts imparting liability.

In support of her opposition, Diatchkova submitted Bouvier's declaration. He learned the Bank's name in October 2012, but he did not learn until after the lawsuit was filed that the Bank was involved in disbursement of the loan proceeds or had been aware of construction defects, and that Azzuz performed repairs before the sale of the property.

Diatchkova also submitted the declaration of her attorney, Donna Kirkner. Kirkner received discovery responses from the Bank on August 12, 2013. The Bank produced an e-mail dated March 11, 2009, from Homsher to the Bank describing Azzuz's concerns about cracking stucco and standing water on the roof, among other items. In

Azzuz's experience, the cracking stucco was the result of insufficient adhesive mixed into the stucco. It was common in cost cutting and the building would have to be painted with elasticomeric paint to cover the cracks. The paint would expand and contract with the stucco. Homsher stated Azzuz was not optimistic that the house would sell for the amount required, and the overall quality of the home was going to be an issue. The company that disbursed the loan proceeds produced invoices from Azzuz for repairing the stucco cracks and correcting the roof slope.

Alternative Strategies produced discovery responses on February 23, 2015, including an email from Homsher dated January 21, 2010, advising the Bank of numerous leaks at the windows and some drywall damage. An email from Homsher dated January 26, 2010, informs the Bank that he is going to visit the property to assess the amount of water damage to the drywall from the window leaks. An e-mail from Homsher on January 27, 2010, informed the Bank that the damage to paint and drywall was minimal and Azzuz had repairs underway.

Diatchkova filed a reply. A hearing was held on September 4, 2015. No reporter's transcript of the hearing is included in the record on appeal. The trial court took the matter under submission. On September 8, 2015, the trial court granted the motion for summary judgment. On September 29, 2015, the trial court entered judgment in favor of the Bank. Diatchkova filed a timely notice of appeal.

DISCUSSION

Standard of Review

In moving for summary judgment, defendants had the burden to show that the cause of action has no merit because an essential element cannot be established or there is a complete defense. (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850, 861.) We review the record and the determination of the trial court de novo, viewing the evidence in the light most favorable to plaintiffs as the losing parties. (*Kahn v. East Side Union High School Dist*. (2003) 31 Cal.4th 990, 1003.)

Relation-Back Doctrine

Diatchkova contends the trial court should have found the amended complaint related back to the original complaint under section 473, because they arose from the same general set of facts. She alternatively contends the amended complaint was filed within the statute of limitations, because she was ignorant of the facts giving rise to her claims against the Bank until she received documents in discovery. We conclude the trial court properly determined that Diatchkova was aware of the Bank's identity and the basis for the Bank's liability prior to filing her initial complaint. As a result, the amended complaint

does not relate back and was filed after the statute of limitations had run on the causes of action against the Bank.

Under section 473, subdivision (a)(1), the court may permit a party "to amend any pleading . . . by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect . . . . The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading . . . in other particulars . . . ."

"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.]" (*Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 176 (*Woo*).)

An exception to the general rule is the substitution of a new defendant for a fictitious Doe defendant named in the original complaint as authorized under section 474. Section 474 provides in pertinent part: "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly." "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. (*Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 599.)" (*Woo*, *supra*, 75 Cal.App.4th at p. 176.)

In order for the relation-back doctrine to apply, the plaintiff must have been genuinely ignorant of the defendant's identity at the time the complaint was filed. (*Optical Surplus, Inc. v. Superior Court* (1991) 228 Cal.App.3d 776, 783–784; *Woo*, *supra*, 75 Cal.App.4th at p. 177.) "The phrase 'when the plaintiff is ignorant of the name of a defendant' in section 474 has not been interpreted literally. It includes situations where the plaintiff "'knew the identity of the person but was ignorant of the facts giving him a cause of action against the person [citations], or knew the name and all the facts but was unaware that the law gave him a cause of action against the fictitiously named defendant and discovered that right by reason of decisions rendered after the commencement of the action. [Citation.]"' [Citation.]" (*Hazel v. Hewlett* (1988) 201 Cal.App.3d 1458, 1464–1465.)

"The omission of the defendant's identity in the original complaint must be real and not merely a subterfuge for avoiding the requirements of section 474. [Citation.] Furthermore, if the identity ignorance requirement of section 474 is not met, a new defendant may not be added after the statute of limitations has expired even if the new defendant cannot establish prejudice resulting from the

delay. (*Hazel v. Hewlett*, *supra*, [201 Cal.App.3d] at p. 1466.)" (*Woo*, *supra*, 75 Cal.App.4th at p. 177.)

A plaintiff need not be aware of each and every detail to be required to name a person whom the plaintiff knows to be involved as a defendant. (*Dover v. Sadowinski* (1983) 147 Cal.App.3d 113, 117–118.) The plaintiff cannot claim to have relied on the defendant's denial of wrongful conduct in not naming the defendant, when the plaintiff knew everything necessary about the defendant at the time of filing the original complaint. (*Optical Surplus, Inc. v. Superior Court*, *supra*, 228 Cal.App.3d at p. 784.)

In this case, undisputed facts establish Diatchkova had information suggesting that the Bank assumed responsibility for the project and arranged its completion, and she learned the Bank's identity, prior to filing her complaint. There was ample evidence to suggest that the Bank had taken on more than a traditional lender's role with respect to the project. On April 2, 2011, Lee told Diatchkova's representative Bouvier that the former owner of the property entered into a settlement relinquishing responsibility for the project to the Bank. Lee said the Bank hired Homsher, who selected Azzuz as general contractor to finish the construction. Bouvier's suspicion that Azzuz was appointed as general contractor by the Bank is expressed in his April 3, 2011 e-mail message. On September 28, 2012, Bouvier asked which bank had finished the construction and whether there was a contract between the bank and the new general contractor, so that Diatchkova could understand the

participants' responsibilities. On October 10, 2012, Diatchkova learned the identity of the Bank when the Bank's attorney contacted Bouvier. Diatchkova had sufficient information to identify the Bank and the Bank's potential liability for acting outside the typical duties of a lender before she filed her original complaint on April 18, 2013. Diatchkova was not genuinely ignorant of the Bank's identity when she filed her complaint and could not later substitute the Bank for a fictitious Doe defendant. Based on our conclusion that the statute of limitations began to run before the lawsuit was filed, not when discovery was received, it is undisputed that the amended complaint was barred by the applicable statute of limitations as against the Bank.

Diatchkova's reliance on *Austin*, *supra*, 56 Cal.2d 596, 599–603, is misplaced. In *Austin*, there was no question that defendant Massachusetts Bonding & Insurance Company was properly sued by a fictitious name in the original complaint and later brought into the case by amendment substituting its true name in accordance with section 474. (*Austin*, *supra*, at p. 602.) The *Austin* court held that whether a defendant is sued by a fictitious name or a true name, an amendment changing the allegations of the complaint will relate back to the original complaint as long as recovery is based on the same general set of facts.

DISPOSITION

The judgment is affirmed. National Bank of California is awarded its costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

KIN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.