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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHETAN JOGANI et al.,

Cross-Complainants and
Appellants,

v.

HARESH JOGANI et al.,

Cross-Defendants and
Respondents.

B288037

(Los Angeles County
Super. Ct. No. BC290553)

APPEAL from orders of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Reversed.

Browne George Ross, Peter W. Ross, Benjamin D. Scheibe and Charles Avrith, for Cross-Complainants and Appellants Rajesh Jogani and Chetan Jogani.

Reed Smith, Raymond A. Cardozo and David J. de Jesus; Law Office of Steven R. Friedman, Steven R. Friedman and Michael E. Friedman, for Cross-Defendant and Appellant Shashikant Jogani.

Morgan, Lewis & Bockius, Thomas M. Peterson and Deborah E. Quick, for Cross-Defendants and Respondents Haresh Jogani, J.K. Properties, Inc., H.K. Realty, Inc., Commonwealth Investments, Inc., Mooreport Holdings Limited, Gilu Investments Limited and Akshi Investments Limited.

Ecoff Campain & Tilles, Lawrence C. Ecoff and Alberto Campain, for Cross-Defendant and Respondent Pinkal Jogani.

INTRODUCTION

In 2015, brothers Chetan and Rajesh Jogani (collectively the Joganis) alleged in cross-complaints that they entered into an oral partnership agreement with a third brother, Haresh Jogani (Haresh), to invest in real property.¹ The cross-complaints also asserted claims against the Joganis' nephew, Pinkal Jogani (Pinkal), who the Joganis alleged was the nominal owner of one of the companies established to hold the partnership's real estate. The Joganis sought dissolution of the partnership and distribution of its assets.

Haresh demurred to the cross-complaints, contending they were barred by the doctrine of judicial estoppel because, in 2004, the Joganis prepared declarations for earlier proceedings in which they expressly disavowed any interest in a partnership with Haresh. Haresh alternatively argued the cross-complaints

¹ We refer to the parties by their first name for the sake of clarity and intend no disrespect.

were time-barred, an argument in which Pinkal joined only as to Chetan's cross-complaint. Haresh and Pinkal argued the claims were time-barred because the Joganis had known since 2004 that Haresh denied the existence of the alleged partnership.

The trial court sustained the demurrers without leave to amend. It reasoned that the Joganis' prior disavowal of the partnership's existence barred their present claims of entitlement to a portion of that same partnership. The court also found the claims time-barred.

The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking inconsistent positions in separate cases. As we previously held in an appeal involving some of these same parties, the doctrine applies only when the prior court has accepted an inconsistent claim by rendering a favorable decision based on that inconsistent claim. We conclude that the order sustaining the demurrer must be reversed because nothing in the record suggests that a prior court adopted or accepted the truth of the Joganis' prior statements. We further conclude the cross-complaints are not facially time-barred.

BACKGROUND

The underlying facts and prior proceedings in this matter are extensive, so we recite only that portion of the history material to the disposition of this appeal. The Joganis allege they both currently live in the United Arab Emirates. The Joganis alleged in cross-complaints that "years ago" they, Haresh and several of his holding companies—J.K. Properties, Inc., H.K. Realty, Inc., Commonwealth Investments, Inc., Mooreport Holdings Limited, and Gilu Investments Limited (collectively

Haresh)—and a fourth Jogani brother formed a joint venture called the “Brothers 4 Joint Venture” for pursuit of interests in the diamond trade, private and public securities, and real estate. The venture conducted business mostly in the name of Haresh, who owned the largest share and was the de facto managing partner, but the brothers agreed the venture was jointly owned.

In 1995, the venture partnered with a fifth Jogani brother, Shashikant, in what the parties refer to as the “California Partnership,” to develop real estate in California.

Disputes arose, and Shashikant sued his four brothers in 2003. In 2004, Chetan and Rajesh were dismissed from that lawsuit without prejudice. Rajesh was dismissed pursuant to a stipulation between the parties; Chetan was dismissed after the court granted his motion to quash service for lack of personal jurisdiction.

Eleven years later, in 2015, Chetan and Rajesh voluntarily submitted to the trial court’s jurisdiction, answered Shashikant’s complaint, and filed cross-complaints against Shashikant, Haresh, Pinkal and related entities. Rajesh filed a second amended cross-complaint, and Chetan a third amended cross-complaint, in September 2017. Those amended cross-complaints assert claims for declaratory relief, breach of fiduciary duty, breach of contract, and conversion, and seek dissolution of the California Partnership and an accounting.

Haresh demurred to these amended cross-complaints, arguing they were barred by the doctrine of judicial estoppel because the Joganis had disavowed the California Partnership in their previously successful efforts to assert lack of personal jurisdiction. In support of the demurrers Haresh sought judicial

notice of declarations purportedly signed by Rajesh on May 3, 2004 and July 15, 2011, and by Chetan on April 3, May 7, and June 11, 2004, denying the existence of the California Partnership. In these declarations, for example, Rajesh declared unequivocally, “I am not now, nor have I ever been, a partner in a partnership . . . that does business involving real estate in California.” Chetan similarly declared “I am not presently nor have I ever been a partner in any California ‘Partnership,’ and I never have had an ownership interest in any partnership or business involving real estate located in California.”

In the demurrer pleadings, Haresh’s attorney did not claim that Rajesh’s declarations were used in connection with any motion to quash service for lack of personal jurisdiction. Haresh’s attorney represented that Chetan submitted two of his declarations to the court in connection with Chetan’s successful 2004 motion to quash Shashikant’s complaint for lack of personal jurisdiction.² Haresh also argued the cross-complaints were untimely, as the 2004 declarations from Rajesh and Chetan demonstrated they had known for a decade that Haresh denied existence of the California Partnership. Pinkal made similar statute of limitations arguments with regard to Chetan’s cross-complaint.

² Haresh’s attorney also represented to the trial court that one of Rajesh’s and one of Chetan’s declarations was used by a prior attorney in connection with a motion for summary judgment brought by Haresh against Shashikant. ~ (1AA 203, 207, 405, 410) ~ On appeal, Haresh drops his contention that any purported use of the Joganis’ declarations in that summary judgment motion was judicial estoppel as to the Joganis, and focuses exclusively on the Joganis’ dismissal for lack of personal jurisdiction.

The Joganis opposed the demurrers, arguing the prior declarations had not been properly authenticated and were not properly subject to judicial notice. The Joganis further argued that Haresh had failed to show the declarations were actually filed with any court, or that any court relied on them. They asserted the cross-complaints were not time-barred because nothing within their four corners indicated the date Haresh breached the California Partnership agreement.

The declarations at issue bear no captions or footers identifying the proceedings in which they were purportedly used and bear no file stamp or other indication they were ever filed in a court. No court file containing them was produced in connection with the demurrers. The trial court nevertheless took judicial notice of the declarations, credited Haresh's attorney's representations as to their use and effect and sustained the demurrers without leave to amend.

The Joganis timely appealed from the resulting judgment of dismissal.³

³ Shashikant also filed a notice of appeal, purporting to appeal from the grant of an ex parte application for entry of an order dismissing the Joganis' cross-complaints. Shashikant did not file any separate appellate briefing, and instead joined in Rajesh's opening brief. It is unclear how Shashikant has standing to appeal from the grant of the demurrers by Haresh and Pinkal to cross-complaints that named Shashikant as a cross-defendant, and none of the briefing addresses that issue. We need not reach the question as it is immaterial to the resolution of the matter before us.

DISCUSSION

A. Standard of Review

On review of a trial court's order sustaining a demurrer we "examine the complaint de novo." (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] 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." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

B. Judicial Estoppel

The Joganis contend the trial court erred in sustaining Haresh's demurrer on judicial estoppel grounds. We agree.

The doctrine of judicial estoppel prevents a party from taking contrary positions in legal proceedings where to do so would result in a miscarriage of justice. (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 169.) Its primary purpose is to protect the integrity of the judicial process by preventing fraud on the courts. (*Ibid.*)

We "consider five factors in determining whether to apply judicial estoppel": (1) Whether " " "the same party has taken two positions" ' "; (2) " " "whether positions were taken in judicial or

quasi-judicial administrative proceedings” ’ ’; (3) “ “ “whether the party was successful in asserting the first position,” ’ ’ i.e., “ “ “the tribunal adopted the position or accepted it as true” ’ ’; (4) whether “ “ “the two positions were totally inconsistent” ’ ’; and (5) whether “ “ “the first position was not taken as a result of ignorance, fraud, or mistake.” ’ ’” (*Jogani v. Jogani, supra*, 141 Cal.App.4th at p. 169.) Judicial estoppel is an equitable doctrine. Its application is discretionary even where all necessary elements are present, and it should be applied with caution and limited to egregious circumstances. (*Id.* at p. 170.)

In deciding whether to apply judicial estoppel, a court must inquire whether the party to be estopped has succeeded in persuading a court to accept that party’s earlier position, such that acceptance of a later inconsistent position would create the perception that the court had been misled. (*Jogani v. Jogani, supra*, 141 Cal.App.4th at p. 171.) Judicial estoppel does not apply where the party to be estopped did not successfully assert his prior position, even if other judicial estoppel factors might independently support application of the doctrine. (*Ibid.*)

Here, the Joganis’ prior declarations are totally inconsistent with their current claims. In 2004, they declared they had no interest in any partnership doing business in California, but in their cross-complaints they claim ownership interests in just such a partnership. No evidence suggests, and the Joganis do not claim, that these inconsistencies were the result of ignorance or mistake.

While the Joganis do contend the declarations were procured through fraudulent representations by Haresh, we need not reach that issue because the judicial estoppel factor of success

is not satisfied on the record here. With one exception involving Chetan, no competent evidence establishes that the declarations were ever used in court, much less that a court accepted them as true. They bear neither captions indicating in what proceedings they were used nor filing stamps indicating they were provided to a court. Nor has any court record, docket, or file been produced containing or referencing them. Although the attorneys for Haresh and Pinkal made a conclusory proffer that the declarations were used in prior proceedings, they did not represent that they were involved in those proceedings, and it appears undisputed they were not. Nor did they supply any other foundation for their proffer.

Haresh now admits that “it is not entirely clear that Rajesh’s May 3, 2004 declaration was filed with the court” What is clear, however, is that Rajesh was dismissed pursuant to a stipulation between the parties, not on the basis of any motion supported by a declaration. Given Haresh’s failure to establish that any declaration from Rajesh was filed with a court, and the fact the trial court dismissed Rajesh pursuant to a stipulation rather than in reliance on any declaration, the trial court erred when it sustained the demurrer to Rajesh’s cross-complaint on the grounds of judicial estoppel.

With regard to Chetan, it appears his April 3, 2004 declaration was used to support his May 17, 2004 motion to quash service of summons for lack of personal jurisdiction. In the motion to quash, Chetan argued he was not subject to jurisdiction in California because he carried on no activity in the state, owned no real property or operated any business in California, was not a partner in any California entity, and did not purposefully avail himself of the privileges and benefits of California law. Although

the declaration is not attached to the motion to quash, the points and authorities supporting the motion refer to “paragraph 13” of a “Chetan Jogani Declaration” for the proposition that Chetan was “not a[n] officer, director nor partner of any California entity.” Paragraph 13 of the April 3, 2004 declaration concordantly provides: “I am not now or have I ever been a partner in a partnership, member of an LLC or shareholder, director, or officer of any corporation or other entity that does business in California” It would therefore appear that Chetan’s April 3, 2004 declaration, in which he takes a position wholly inconsistent with his position in this litigation, was used in prior court proceedings. Additionally, it is undisputed that Chetan was successful in those proceedings, as the trial court granted his motion to quash.

Nothing in the record, however, indicates the court that granted the motion to quash adopted any position Chetan took in 2004 that is inconsistent with Chetan’s position now. “When a defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction.” (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449.) Haresh did not include his opposition to the motion to quash as an exhibit to his demurrer on judicial estoppel grounds, so we have no indication of what jurisdictional facts Haresh argued to satisfy his initial burden. Chetan’s reply, however, was attached to the demurrer. That reply argued the motion to quash should be granted because (1) there was a lack of personal service, (2) the signing of an unrelated declaration by Chetan was not, as Haresh claimed, a general appearance, and (3) Haresh had failed to meet his burden to establish jurisdiction by making “only conclusory

allegations without providing any evidence or support for his allegations whatsoever.” Needless to say, none of these reasons relied on the facts asserted in Chetan’s declaration concerning the California Partnership.

The notice of ruling, prepared by Haresh’s attorney, states only the following: “Defendant Chetan Jogani’s Motion to . . . Quash Service of Summons for Lack of Personal Jurisdiction . . . was granted.” Chetan asserted several reasons why he was not subject to personal jurisdiction in California, and it is certainly possible the court granted the motion to quash based one of those many reasons—Chetan’s disavowal of any interest in the California Partnership. But it is equally possible the court found Haresh failed to carry his burden of proof and thus did not even need to consider Chetan’s declaration. Or it is possible the motion to quash court disregarded the conflicting claims about the California Partnership and focused elsewhere in deciding the issue of whether Chetan and Rajesh had minimum contacts with California because “jurisdiction over a partnership, even a general partnership, does not alone confer jurisdiction over the partners.” (*Sacramento Suncreek Apartments, LLC v. Cambridge Advantaged Properties II, L.P.* (2010) 187 Cal.App.4th 1, 14.)

“[E]stoppel only applies when a tribunal in a prior proceeding has accepted the claim at issue by rendering a favorable decision. . . . By adopting a rule that requires acceptance by the earlier tribunal of the litigant’s statements, this court limits the doctrine of judicial estoppel to situations where the risk of inconsistent results with its impact on judicial integrity is certain.’” (*Jogani v. Jogani, supra*, 141 Cal.App.4th at p. 180.) “We are loath to condone perjury. . . . But the doctrine

of judicial estoppel should not be stretched beyond its limited purpose: to protect the integrity of the judicial process, primarily by precluding a party from taking inconsistent positions that pose a risk of inconsistent court determinations.” (*Id.* at p. 188.) Here, there was a lack of evidence Rajesh’s prior inconsistent statements were submitted to the court, such that there was no evidence the statements were relied upon. The impact of Chetan’s prior inconsistent statements on judicial integrity is similarly unknown, as it is unclear whether the trial court relied upon his prior declaration in granting the motion to quash. While Haresh may be able to make the requisite showing at a later point in the proceedings for the application of judicial estoppel, the trial court erred in applying that doctrine at the demurrer stage.

C. Timeliness

The Joganis argue the trial court erred in sustaining the demurrers of Haresh and Pinkal on the alternative ground that their cross-complaints were time-barred. We agree.

“ ‘Statute of limitations’ is the ‘collective term . . . commonly applied to a great number of acts,’ or parts of acts, that ‘prescribe the periods beyond which’ a plaintiff may not bring a cause of action.” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 395.) A cause of action brought outside an applicable period is time-barred. (*Ibid.*) The applicable period commences when the cause of action accrues, that is, “ ‘when, under the substantive law, the wrongful act is done,’ or the wrongful result occurs, and the consequent ‘liability arises.’ ” (*Id.* at p. 397.) “An exception to the general rule for defining the accrual of a cause of action . . . is the discovery rule,” which “postpones accrual of a cause of action

until the plaintiff discovers, or has reason to discover, the cause of action.” (*Ibid.*)

“[R]esolution of the statute of limitations issue is normally a question of fact.” (*Romano v. Rockwell Internat.* (1996) 14 Cal.4th 479, 487 (*Romano*).) A complaint brought after an applicable limitations period has run is subject to demurrer, but only if the complaint discloses on its face that the action is necessarily barred. (*Childs v. State of California* (1983) 144 Cal.App.3d 155, 160–161.) The parties dispute whether the claims in the cross-complaints are subject to two, three, and/or four year statutes of limitations. We need not resolve that issue because the allegations of the cross-complaints did not disclose on their face the claims asserted in the cross-complaints were necessarily barred applying any of those time frames.

With regard to the claims asserted by the Joganis, nothing on the face of either cross-complaint (they are almost identical) discloses when any wrongful act was done or wrongful result occurred, and thus nothing indicates when liability accrued. For example, nothing indicates when Haresh allegedly breached the partnership agreement or any fiduciary duty to the Joganis. Therefore, no basis exists to conclude the cross-complaints are time-barred, and the trial court erred in sustaining the demurrers on this ground.

Haresh and Pinkal argue the Joganis allege Haresh began retaining partnership monies “for himself” in 2001, thus triggering the statute of limitations, but ignore the accompanying allegation that the Joganis only lately became aware of this fact.

Haresh and Pinkal further argue the Joganis admitted in their 2004 declarations that the Joganis knew by 2003 that

Haresh had repudiated any partnership agreement. But this matter is outside the complaint and not subject to judicial notice. (See *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374 [“Taking judicial notice of a document is not the same as accepting the truth of its contents”]; *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 864–865 [“Although a court is authorized to take judicial notice in connection with a demurrer [citation], it may not judicially notice the truth of assertions in declarations or affidavits filed in court proceedings”].)

While the cross-complaints do reference that the Joganis signed declarations denying the existence of the California Partnership, the cross-complaints further allege the declarations were coerced by economic threats from Haresh, that “Haresh explained the declarations were only for use in the lawsuit,” and that Haresh assured Chetan and Rajesh “that, in reality, the California Partnership would continue to exist and operate with Haresh, Rajesh, . . . and Chetan as partners, but without Sashikant” Accordingly, nothing on the face of the cross-complaints indicated the Joganis believed Haresh had in fact repudiated the partnership agreement, or that they elected to treat Haresh’s repudiation as a breach or basis for dissolution. Nor is there any allegation in Chetan’s cross-complaint that Pinkal ever repudiated his obligations to anybody, let alone Chetan.

For the purpose of determining when the period of limitations begins to run, a plaintiff may elect to rely on a contractual agreement despite a breach, “and the statute of limitations does not begin to run until the plaintiff has elected to treat the breach as terminating the contract. [Citation.] In the context of successive breaches of a continuing contractual

obligation, [our Supreme Court] ha[s] explained: ‘ “In such a contract . . . the injured party could wait until the time arrived for a complete performance by the other party and then bring an action for damages for such breaches.” ’ ’ ” (*Romano, supra*, 14 Cal.4th at pp. 489–490.) A nonbreaching party, such as Rajesh or Chetan, is “not bound to treat the contract as abandoned on the first breach of it, or on any particular breach,” but may elect still to rely on it, and the limitations period does not begin to run until the nonbreaching party makes its election. (*Id.* at p. 490.)

Finally, citing *Estate of Fincher* (1981) 119 Cal.App.3d 343 and *Manok v. Fishman* (1973) 31 Cal.App.3d 208 (*Manok*), Haresh and Pinkal argue that the Joganis’ cooperation in Shashikant’s purported expulsion from the partnership was an event of dissolution, and commenced the statute of limitations on the Joganis’ dissolution and accounting claims. Both *Estate of Fincher* and *Manok* were decided under pre-1994 law, which provided a partner’s withdrawal or expulsion “automatically dissolved the partnership and the partnership had to be reconstituted, unless the partnership agreement specially provided otherwise.” (Fotinos et al., Cal. Practice Guide: Pass-Through Entities (The Rutter Group 2019) ¶ 3:451.) Since that time, California adopted the Uniform Partnership Act which provides that a partnership is dissolved only upon the occurrence of certain events. (Corp. Code, § 16801.) The cross-complaints’ allegations, which must be taken as true at the demurrer stage, assert that the grounds for dissolution under Corporations Code section 16801 occurred “within the past year.”

DISPOSITION

The orders sustaining the demurrers are reversed. Chetan and Rajesh Jogani are to recover their costs on appeal.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

BENDIX, J.

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