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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

JOSEPH L. SHALANT,

Plaintiff and Respondent,

v.

DAVID WIEGER et al.,

Defendants and Appellants.

2d Civil No. B295087
(Super. Ct. No. 18CV03287)
(Santa Barbara County)

Joseph L. Shalant appeals a judgment entered following the trial court's orders sustaining a demurrer without leave to amend and dismissing his action. (*Le Mere v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 237, 242 [order sustaining demurrer without leave to amend reviewable from judgment entered on dismissal of action].)

This appeal arises from a residential real estate transaction in which the purchaser asserts that the seller's agent did not timely inform him of a recorded pipeline easement on the property. In his initial complaint against the seller's agent for fraudulent concealment, the purchaser admitted that he had

actual knowledge of the easement prior to the close of escrow. He chose to consummate the transaction, however, and then bring this action for fraudulent concealment. The trial court sustained the agent's demurrer with leave to amend. The purchaser could not plead around his earlier admissions, however, and the trial court sustained a demurrer to the purchaser's first amended complaint without leave to amend further. Joseph Shalant, the purchaser, now appeals in propria persona. We affirm.

FACTUAL AND PROCEDURAL HISTORY

On June 29, 2018, Shalant brought an action for fraudulent inducement to enter a contract against a licensed real estate agent, David Wieger, and his employer, Keller Williams Realty (collectively "Wieger"). Shalant alleged that he agreed to purchase a home located at 588 Puente Drive in Santa Barbara for $1,124,500. When Shalant negotiated the sales price, signed the offer to purchase, and made an escrow deposit, he was unaware that a pipeline easement ran adjacent to the living room of the home. This alleged material defect affected the property value. During the escrow period, Shalant learned of the easement from documents provided by the escrow company, including an amended written transfer disclosure statement as mandated by Civil Code section 1102.3.[1] Shalant also alleged that through his independent investigation, he contacted a prior purchaser who cancelled his purchase agreement when he too learned of the pipeline easement. Shalant alleged that he "was deprived of the opportunity to negotiate a lower price for the property" and became "legally and psychologically committed to completing the purchase." Escrow for sale of the property closed September 1, 2015. By his complaint, Shalant demanded $30,000

[1] All statutory references are to the Civil Code.

to remove the easement and punitive damages for its fraudulent concealment, among other damages.

Wieger demurred to the complaint for failure to state a cause of action. The trial court sustained the general demurrer and permitted Shalant to amend his complaint. On November 13, 2018, Shalant filed a first amended complaint. He stated similar allegations, but added that he did not receive a timely transfer disclosure statement that would have allowed him to negotiate a lower purchase price in light of the pipeline easement. Shalant alleged that the property sellers offered to cancel the transaction but did not offer a price concession. Wieger again demurred. This time the court sustained the demurrer without leave to amend further.

DISCUSSION

I.

Shalant argues that he was entitled to complete the purchase and then bring a lawsuit for fraud, relying on *Jue v. Smiser* (1994) 23 Cal.App.4th 312, 317. He also asserts that the amended transfer disclosure statement was not timely pursuant to section 1102.3.

In reviewing an order sustaining a general demurrer, we exercise our independent judgment to determine whether the complaint states a cause of action as a matter of law. (*Kahan v. City of Richmond* (2019) 35 Cal.App.5th 721, 730.) We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010; *Kahan*, at p. 730.) Moreover, we give the complaint a reasonable interpretation, reading it as a whole and its parts in context. (*Centinela*, at

p. 1010.) Plaintiff bears the burden of establishing that the allegations of the complaint establish every element of his cause of action. (*Ibid.*; *Kahan*, at p. 730.) A plaintiff should be permitted "great liberality" in amending his complaint, but not where an amendment would be futile. (*Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 726.) We apply the abuse-of-discretion standard in our review of the court's order sustaining a demurrer without leave to amend. (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400-401.)

The elements of a cause of action for fraudulent concealment are: 1) the defendant concealed or suppressed a material fact; 2) the defendant was under a duty to disclose the fact to the plaintiff; 3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; 4) the plaintiff was unaware of the fact and would have acted differently had he or she known of the concealed or suppressed fact; and 5) resulting damage. (*Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 850.)

Here, Shalant alleged that he received documents during escrow describing the pipeline easement, including an amended transfer disclosure statement that disclosed the easement. He also alleged that he independently learned from a prior purchaser that the easement existed. Shalant thus had actual knowledge of the pipeline easement prior to the close of escrow. Nevertheless, he proceeded to complete the purchase. These allegations preclude Shalant from establishing that he was unaware of the easement and would have acted differently had he known of its existence. (*Kaldenbach v. Mutual of Omaha Life Ins. Co.*, *supra*, 178 Cal.App.4th 830, 850.)

The dissent relies on the well-established rule in *Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 750, that holds that a party may sue for fraud instead of rescinding a contract. *Bagdasarian* has no application to a contract that has yet to be performed. The holding the dissent seeks to apply here would drain the life blood out of escrow agreements. If a party knows about fraud before the terms of the contract are carried out, there is no reliance. The very purpose of an escrow is to give the parties an opportunity to determine necessary facts to help them decide whether to proceed with the contract.

We believe *Jue* was wrongly decided, but even if it were a correct holding, its unique facts make it markedly distinguishable from the instant case. *Jue* concerned an affirmative misrepresentation regarding the identity of an architect of a residence. The purchasers of the property learned otherwise prior to the close of escrow. Nevertheless, they proceeded to purchase the property and then brought an action for fraud, among other causes of action. (*Jue v. Smiser*, *supra*, 23 Cal.App.4th 312, 314-315.) *Jue* held: "[R]eliance must be established at the time the initial contract is struck. It is not necessary that a claimant establish *continuing* reliance until the contract is fully executed in order to maintain an action for damages." (*Id.* at p. 317.) Unlike the circumstances in *Jue*, the allegations here complain of an initial concealment that was corrected by the seller's agent prior to the close of escrow. *Jue* also emphasized that the buyer was presented with an "extraordinarily difficult choice" because he was first alerted to the misrepresentation two days before the close of escrow and he could not, despite his investigation, determine whether the

misrepresentation was false. (*Id.* at p. 319.) These essential differences make *Jue* distinguishable.

Shalant's interpretation of section 1102.3 is also incorrect. Section 1102.3, subdivision (a) requires the seller to issue a transfer disclosure statement "as soon as practicable before transfer of title." Subdivision (b) of that section requires the seller to provide a transfer disclosure statement "as soon as practicable before execution of the contract" in the case of a lease with an option to purchase, a ground lease with improvements, or a real property sales contract as defined by section 2985 [conveyance of title is not required within one year of the formation of the contract].)[2] Subdivision (b) does not apply to Shalant's transaction.

II.

Shalant, a vexatious litigant, contends that the trial court abused its discretion by denying oral argument regarding the demurrer to his first amended complaint. He relies upon *TJX Cos. v. Superior Court* (2001) 87 Cal.App.4th 747, 751-752 (oral argument necessary to determine the propriety of a demurrer to attack class action allegations) and *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 574 (evidentiary hearing on petition for writ of habeas corpus required where trial court so directed by appellate court).

At the hearing regarding the demurrer to the first amended complaint, Shalant asked "to be able to argue." The trial court referred to Shalant's status as a vexatious litigant, impliedly

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[2] This type of real property sales contract is sometimes referred to as a "land installment sale contract." (*Petersen v. Hartell* (1985) 40 Cal.3d 102, 106, fn. 1.)

denied oral argument, and adopted the earlier tentative ruling sustaining the demurrer without leave to amend.

The trial court did not abuse its discretion by denying oral argument. There is no general due process right to be heard at oral argument on every motion in the trial court. Indeed, whether a right to oral argument exists on a statutory motion depends upon legislative intent. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1244-1245.)

Shalant received an opportunity to be heard through his motion papers. He has not explained how oral argument would have added to the argument set forth therein or how the tentative ruling would have changed. Even if a statute required a "hearing" on the matter, this does not necessarily mean that oral argument is required: "California courts have concluded that use of the terms 'heard' or 'hearing' does not require an opportunity for an oral presentation, unless the context or other language indicates a contrary intent." (*Lewis v. Superior Court*, *supra*, 19 Cal.4th 1232, 1247.) "Where a statute provides for a 'hearing,' it does not necessarily demand the parties be given an opportunity to orally argue the case." (*Medix Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 113.)

The judgment is affirmed. Respondent shall recover costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P. J.

I concur:

YEGAN, J

TANGEMAN, J.:

I respectfully dissent. In *Jue v. Smiser* (1994) 23 Cal.App.4th 312, 313-314 (*Jue*), the defendants represented that a famous architect designed a home the plaintiffs intended to purchase. After they executed the sales contract but two days before the close of escrow, the plaintiffs learned that the defendants' representation might not be true. (*Id*. at p. 314.) The *Jue* court concluded that the plaintiffs could nevertheless complete the purchase and sue for fraud: What mattered was their reliance on the defendants' representations when they agreed to purchase the property, not when the contract was fully executed. (*Id*. at pp. 315-319.)

The same is true here. *Jue* is merely one application of the longstanding California rule that a defrauded party "may, instead of rescinding, elect to stand on [a] contract and sue for damages, and[,] in such cases [the] continued performance of the agreement does not constitute a waiver of [an] action for damages." (*Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 750.) That *Jue* considered a case of affirmative misrepresentation whereas this case involves fraudulent concealment is of no significance: Numerous cases involving concealment have applied the *Bagdasarian* rule. (See, e.g., *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294-295; *De Campos v. State Comp. Ins. Fund* (1954) 122 Cal.App.2d 519, 523-528; cf. *Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1000-1002 [jurors need not agree on nature of fraud committed].) Nor is it significant that the concealment here was corrected before the close of escrow: The *Jue* plaintiffs also learned of the misrepresentation before the close of escrow. (*Jue*, *supra*, 23 Cal.App.4th at pp. 314-315.) That they then had just two days to

decide whether to complete their purchase or rescind the deal was not determinative; a fraud victim "should not be forced to make such a choice." (*Id.* at p. 319.) This is true whether the fraud victim has two days or two weeks to do so.

NOT TO BE PUBLISHED.

TANGEMAN, J.

Donna D. Geck, Judge

Superior Court County of Santa Barbara

Joseph L. Shalant, in pro. per., for Plaintiff and Appellant.

McCarthy & Kroes, R. Chris Kroes, and Linda Elias-Wheelock for Defendants and Respondents.