

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOHN POON et al.,

Plaintiffs and Respondents,

v.

WENDY LAM et al.,

Defendants and Appellants.

B233572

(Los Angeles County
Super. Ct. No. GC043359)

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

Mark M. O'Brien for Defendants and Appellants.

Vincent Y. Lin for Plaintiffs and Respondents.

INTRODUCTION

Appellants appeal from a judgment entered following a bench trial. Appellants claim the trial court's order granting summary adjudication during the course of the proceedings in favor of respondents resulted in an erroneous rescission of two contracts and an erroneous imposition of damages and prejudgment interest. The two contracts involved are (1) an assumption of a commercial lease agreement and (2) an escrow agreement for the purchase of fixtures, equipment, and payment for the value of a leasehold interest in real property¹. The gravamen of the dispute pertains to offsite parking and whether or not an ordinance for the City of San Gabriel restricting such parking is grounds for rescission of the contracts aforescribed as decided by the trial court. For the reasons set forth, we find reversible error and remand the matter to the trial court for further proceedings.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Facts

The parties are two plaintiffs/respondents, John Poon and CMAJ Investment, Inc.,² and three defendants/appellants, Las Tunas Plaza, Inc. (master landlord), Wendy Lam (tenant), and Newport Seafood Group, Inc. (restaurant business).³ John Poon entered into a real estate lease with Wendy Lam while CMAJ Investment, Inc. entered into an agreement to purchase the restaurant and fixtures from Newport Seafood Group, Inc.

¹ The property involved is a commercial unit in a shopping center, commonly known as 835 West Las Tunas Drive, in the City of San Gabriel hereafter referred to as "the property."

² John Poon and CMAJ Investment, Inc. will hereinafter be collectively referred to as "respondents."

³ Las Tunas Plaza Inc., Wendy Lam, and Newport Seafood Group, Inc. are collectively referred to hereafter as "appellants."

On or about March 3, 2009, CMAJ Investment, Inc. became signatory to bulk sales escrow instructions with Newport Seafood Group, Inc. for the purchase of fixtures and equipment, and for the purchase of Newport Seafood Group, Inc.'s leasehold interest in the property. On April 1, 2009, John Poon, in his individual capacity, assumed a commercial lease from Wendy Lam, via execution of an Assignment and Assumption of Lease Agreement.

II. Proceedings

A. Respondents' action for rescission and damages

On or about July 13, 2009, respondents brought an action which included, among other things, a statement of grounds for rescission of the underlying agreements on the basis that respondents were unable to obtain a business license to operate a restaurant at the property because of inadequate parking. The complaint also alleged entitlement to recover damages by reason of deceit, negligent misrepresentation and breach of contract all relating to the bulk sale escrow instructions and assignment and assumption of lease agreement referred to collectively as "agreements."

B. Appellants' answer to complaint

In their answer to the complaint for rescission, appellants asserted, among other things, that respondents failed to exercise reasonable and ordinary care, caution or prudence in order to avoid the incident or circumstances giving rise to their claim for rescission and damages. Appellants further claimed that the resulting damages, if any, sustained by respondents were proximately caused and contributed to by their negligence because respondents failed to take reasonable precautions to avoid or mitigate the harm alleged in the complaint. In addition, appellants claim that respondents assumed the risk of obtaining the necessary licensing and permits to operate a business at the property and pled as an affirmative defense assumption of the risk.

C. Respondents' First Motion for Summary Adjudication

In July 2010, respondents filed a motion for summary adjudication seeking to rescind the agreements based on mutual mistake, unilateral mistake, failure of consideration, and frustration of purpose. Appellants served and filed their opposition

consisting of evidence showing that respondents had never submitted an application for a business license. Respondents reacted by withdrawing their motion before the court had an opportunity to rule.

D. Respondents' Second Motion for Summary Adjudication

In November 2010, respondents received a written denial of their business license application from the City of San Gabriel which led to their second motion for summary adjudication of their rescission claim based on grounds contained in their first motion, i.e. mutual mistake, unilateral mistake, failure of consideration, and frustration of purpose.

E. Appellants' Opposition

Appellants filed their opposition in January 2011. Appellants alleged that there were triable issues of material fact with regards to mutual or unilateral mistake because respondents failed to exhaust their administrative remedies. Additionally, appellants contended that there could not have been any mutual mistake pertaining to the ordinances because appellants had not made any representations regarding the sale of the fixtures and equipment or the leasehold interest.

F. Respondents' Reply

Respondents filed their reply on January 27, 2011. Respondents emphasized that the issuance of a business license was a material portion of the contracts entered into with appellants. Respondents further noted that the contracts did not apportion the risk to respondents to acquire a business license.

G. Court's Ruling

On February 2, 2011, the court conducted a hearing on respondents' motion for summary adjudication. On February 16, 2011, the court granted respondents' motion based on mutual and unilateral mistake but denied rescission based on failure of consideration and frustration of purpose.

H. Appellants' Motion for Reconsideration

On February 28, 2011, appellants filed a motion for reconsideration seeking to obtain a revocation of the order granting summary adjudication for respondents in view of a change in the Municipal Code which was approved on February 1, 2011. In essence,

the new law made it easier for business owners to meet the City's parking requirements by allowing offsite parking within 500 feet instead of just 300 feet and also allowing the use of valets to park vehicles. Respondents had an application pending with the planning commission with a public hearing set on the matter for February 14, 2011. Respondents withdrew their application two days before the planning commission hearing.

The court denied appellants' motion for reconsideration and set the matter for trial on the remaining damages claim.

I. Bench Trial

On March 9, 2011, the court conducted a one day bench trial. Respondents dismissed all causes of action except those deemed to be in respondents' favor in the ruling on their motion for summary adjudication on February 16, 2011. The court concluded that the only issue for trial was the amount of respondents' damages.⁴ The court ruled that appellants had no affirmative defenses as a matter of law. Appellants were precluded from eliciting expert testimony regarding the standard of care in the food service industry. The court awarded respondents a total of \$201,223.30 in damages, including prejudgment interest. The court entered its judgment on April 4, 2011.

Appellants filed a timely notice of appeal.

APPELLATE CONTENTIONS

I. Alleged Improper Use of Code of Civil Procedure section 437c in Granting Summary Adjudication

Appellants' first contention on appeal pertains to an alleged improper use of Code of Civil Procedure section 437c in granting the motion for summary adjudication in favor of respondents. Appellants claim the errors were as follows: (1) respondents failed to request adjudication of appellants' affirmative defenses thereby lacking statutory authority for their motion; (2) the trial court improperly overruled all of appellants'

⁴ We note, however, that once respondents dismissed all of their non-rescissionary claims, which followed the granting of respondents' motion for summary adjudication, the issue of damages was fully litigated and damages were unavailable.

objections to evidence; and (3) summary judgment was improper because there were triable issues of material fact which required resolution by the trier of fact.

II. Alleged Violation of Code of Civil Procedure section 1008 in Denying Appellants' Motion for Reconsideration

Appellants' second contention alleges a violation of Code of Civil Procedure section 1008 in denying appellants' motion for reconsideration for the following reasons: (1) the court should have vacated the order based upon new law passed by the San Gabriel City Council which voted to approve Ordinance No. 589 that made various amendments to the San Gabriel Municipal Code relating to zoning; (2) a change in circumstances justified a vacation of the court's order; and (3) the trial court erred in not correcting its error of law when brought to the court's attention.

III. Alleged Error in Excluding Expert Testimony on the Standard of Care

Appellants' third and final contention pertains to an alleged error of the trial court in excluding expert witness testimony relevant to appellants' affirmative defenses, namely, the testimony of one Don J. Avalier in his capacity as a food service consultant, pertaining to the alleged conduct of John Poon which would have indicated an extreme departure from the ordinary standards of conduct by which reasonable people are governed in such situations. Further, that John Poon's duty arose from his relationship to his shareholders who had entrusted him to invest their money wisely.

DISCUSSION

Alleged Improper Application of Code of Civil Procedure section 1008 in Denying Appellants' Motion for Reconsideration.

This court finds it unnecessary to reach appellants' first (improper use of Code of Civil Procedure section 437c) and third (exclusion of expert testimony) contentions on appeal. Our reasoning is based on finding merit in appellants' second contention pertaining to an alleged improper application of Code of Civil Procedure section 1008 in denying appellants' motion for reconsideration.

The statutory background for permitting a losing party to make a motion for reconsideration is to be found in Code of Civil Procedure section 1008. Such a motion must be (1) brought before the same judge; (2) made within 10 days after service upon the party of notice of entry of order; (3) based on *new or different facts, circumstances or law* than those before the court at the time of the original ruling; (4) supported by declaration stating the previous order, by which judge it was made, and the new or different facts, circumstances or law claimed to exist; and (5) made or decided before entry of judgment.

With this statutory background in mind we examine the facts and law as they existed when the court heard respondents' motion for summary adjudication on February 2, 2011, and subsequently entered its order of summary adjudication on February 16, 2011.

On February 1, 2011, the San Gabriel City Council voted to approve Ordinance No. 589 that made various amendments to the San Gabriel Municipal Code relating to zoning. Two of those changes pertained to easing of parking requirements. Valet parking was added (§ 153.228) as a permitted option on private property. Prior to this change, the City Code did not allow valet parking. The amendment also allowed for a valet loading zone in the public right of way as long as the loading zone was safe for patrons and did not impede the use of the parking lot.

The other amendment to the Municipal Code (§ 153.225) extended the distance for offsite parking from within 300 feet to within 500 feet. A public parking lot existed on Alanmay Avenue, within 500 feet of the subject restaurant. Respondents previously sought both valet parking and offsite parking on Alanmay Avenue where there is a public parking lot more than 300 feet from the subject property, however the municipal code did not provide these options at that time.

The changes in the municipal code were not previously considered by the court or any of the parties during the pendency of the motion for summary adjudication.

On February 11, 2011, respondents withdrew their pending application for a variance with the City of San Gabriel. The matter was set to be heard on February 14, 2011, by the San Gabriel Planning Commission.

Appellants claim to have recently discovered that the City of San Gabriel never properly terminated the legal nonconforming restaurant use for the subject property. The San Gabriel Municipal Code provides that the City must give written notice by certified mail with return receipt before terminating a nonconforming use. Section 153.424 entitled “Notification of Termination and Appeal” provides as follows: (A) Notification to the owner of record of any nonconforming use, structure or lot subject to termination pursuant to this subchapter shall be provided in writing by the Community Development Department, served by certified mail, return receipt first class mail, of the pending termination. The notification shall contain the following information:

- (1) The location of the nonconforming use, structure or lot including street address and assessor’s parcel number;
- (2) The section of this code requiring termination;
- (3) The effective date of said termination; and
- (4) The process of appeal of said termination.

Appellants claim the City of San Gabriel never provided notice of termination of nonconforming use as required by the municipal code. Appellants never had notice that the use of the property as a restaurant was a nonconforming use, and they were never given notice from the City of San Gabriel that the nonconforming use of the property would be terminated for lapse of use after 120 days. Documents belonging to the City confirm that the reason respondents’ business license was denied was because the City considered the legal nonconforming use of the subject property to be terminated.

We note that appellants requested the trial court to revisit the statutory authority for respondents’ motion as noticed, and for the court on its own motion, to sua sponte revoke its order granting summary adjudication. Appellants contend that even if the court had found that there were no new or different facts, circumstances or law to base a motion for reconsideration, the court has inherent power to correct its own errors when

they are called to the court's attention. (*Marriage of Barthold* (2008) 158 Cal.App.4th 1301, 1308.)

We agree with appellants' contention that under the circumstances of this case it was erroneous for the trial court to refuse to grant appellants' motion for reconsideration and if necessary to invoke the court's inherent power in addition to its statutory authority.

It is patently conspicuous from the record on appeal that new or different facts, circumstances or law relevant to respondents' motion for summary adjudication pertaining particularly to stated grounds for rescission were extant giving rise to triable issues of material fact. The reason that the evidence was new is that the ordinance was passed too late for appellants to properly place the information before the trial court for consideration during respondents' motion for summary adjudication. The motion for reconsideration should have been granted and it was error for the trial court not to have done so.

DISPOSITION

The judgment is reversed and remanded for further proceedings not inconsistent with this opinion. Appellants are entitled to costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.