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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROSCOE STEEL & CULVERT CO.,
INC. et al.,

Plaintiffs and Respondents,

v.

MORILLO CONSTRUCTION, CO.,
INC.,

Defendant and Appellant.

B272348

(Los Angeles County
Super. Ct. Nos. GC046088,
EC063824 and BC496292)

APPEAL from a judgment of the Superior Court of Los Angeles County. William D. Stewart, Judge. Affirmed.

Feldman & Associates, David J. Sire, Jr. and Mark A. Feldman; Peckar & Abramson and Alex R. Baghdassarian for Defendant and Appellant.

City of Pasadena, Michele Beal Bagneris and Javan N. Rad; Gibbs Giden Locher Turner Senet & Wittbrodt, Michael B. Geibel and Sara Kornblatt for Plaintiffs and Respondents.

This action is Morillo Construction, Inc.'s third attempt to sue the City of Pasadena (City) for damages arising out of the City's cancellation of a portion of a construction project. In 2008, Morillo and the City entered into a contract whereby Morillo agreed to serve as the general contractor on a project for the construction of one building and the renovation of another. Midway through the project, the City cancelled the renovation portion of the project. Morillo separately sued the City for breach of contract in both 2011 and 2012. Judgment was entered for the City in the first action, and the second action is pending.

In 2015, Morillo filed the third and present lawsuit against the City for what it calls "tortious" breach of contract, and against City employees for fraud and negligence arising from their management of the project's budget. The trial court concluded the action was an improper attempt to split Morillo's causes of action, all of which were essentially breach of contract claims, and that the time to file such claims had expired. The court sustained the defendants' demurrer without leave to amend. Morillo now appeals from the subsequent judgment. Morillo argues that its tort claims involve a separate primary right than its contractual causes of action, and that its current claims are timely due to its delayed discovery of respondents' tortious conduct. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Contract and Construction Project

In December 2008, the City and Morillo entered into a written agreement that called for Morillo to serve as the general contractor on a project for the City's Department of Water and Power. The project was for the construction of a new facility (Phase 1) and renovation of a building (Phase 2). The contract

provided that Phase 2 would commence “after occupants are relocated to the new structures completed” in Phase 1. The City awarded the project to Morillo for approximately \$16.9 million.

In February 2009, the City sent Morillo a notice to proceed with Phase 1, instructing Morillo to begin work the following month. The notice provided: “this initial notice to proceed is not effective to authorize any [Phase 2] work on-site prior to the completion of the [Phase 1] work, provided, however, that [Morillo] may request the City’s approval to incur costs related to preconstruction services if [the] City’s prior written consent as to the nature and cost of the preconstruction services is obtained before such costs are incurred.”

Morillo began work on Phase 1 in or around March 2009. On February 10, 2010, before Phase 1 had been completed, the City notified Morillo it was cancelling Phase 2 of the project.

2. *The 2010 Action*

On October 1, 2010, eight months after the City cancelled Phase 2, one of Morillo’s subcontractors, Roscoe Steel & Culvert Company, Inc. (Roscoe), sued Morillo and the City for breach of contract, alleging their failure to pay for work performed. The City cross-complained against Morillo seeking indemnification for any damages awarded against it in Roscoe’s action. The City alleged that Morillo had breached their contract by allowing Roscoe to perform work on Phase 2 without the City’s authorization.

On December 7, 2010, Morillo filed a cross-complaint against Roscoe for breach of contract. An additional cause of action for breach of contract as to unnamed Doe defendants alleged the existence of Morillo’s contract with the City for Phases 1 and 2 of the project, that Morillo had performed all

unexcused obligations under the contract, and that the public entity Doe defendant had breached the contract by delaying various payments and failing to deal in good faith in regard to change orders and other unspecified matters.

In March 2011, several months *after* Morillo filed its cross-complaint against Roscoe and Doe defendants, it presented a claim to the City pursuant to Government Code section 911 seeking payment for work performed under the contract. The City rejected the claim the following month. Morillo also presented a “payment application” to the City for 100 percent of the work of Phase 2. The City rejected the application stating that Morillo “continues to disregard: (1) the initial notice to proceed for [Phase 1] Work only, dated February 29, 2009; (2) [the] City’s letters . . . regarding the deletion of [Phase 2] Work”

In October 2011, approximately five months after the City’s rejection of the Government Code claim, Morillo filed a form fictitious name amendment that named the City as one of the Doe defendants to the cross-complaint. The City demurred to the cross-complaint, and the trial court overruled the demurrer.

The City then petitioned for writ of mandate. On June 6, 2012, we issued an Order and Alternative Writ directing the trial court to reverse itself and enter an order sustaining the demurrer without leave to amend. We reasoned as follows: Morillo’s Doe amendment “adding [the City] to the cross-complaint was improper in that Morillo was not ignorant of either petitioner’s identity or of facts giving rise to a cause of action against [the City] at the time it filed its cross-complaint. . . . It is now too late for Morillo to file an amended complaint adding [the City] as a

cross-defendant in that more than six months have passed since [the City] rejected Morillo's claim under the Torts Claims Act."

In response, the trial court vacated its ruling overruling the City's demurrer and sustained the demurrer without leave to amend. On August 6, 2012, judgment on the cross-complaint was entered in the City's favor. Morillo appealed, and we affirmed holding, "Because Morillo did not properly name the City as a fictitious defendant, the statute of limitations expired and the order sustaining the demurrer without leave to amend was therefore proper." (*Morillo Construction, Inc. v. City of Pasadena, et al.* (Feb. 4, 2014, B243838) [nonpub. opn.])

3. *The 2012 Action*

In September 2012, one month after judgment on the cross-complaint was entered against Morillo; Morillo submitted a second Government Code claim to the City. Morillo again claimed the City owed some \$3 million for work performed under the contract. The City rejected the claim.

In November 2012, Morillo sued the City for breach of contract and "recovery of statutory penalties." Morillo sought \$3 million in damages for the City's alleged breaches which were described as follows: the City delayed progress payments to Morillo, delayed the processing and payment of change orders, failed to negotiate change orders in good faith, and did not deal with Morillo in good faith.

The City demurred to the complaint. The court overruled the demurrer on the ground that this action was based on "different work" than the first action against the City. The City objected, arguing that Morillo sought to recover the same damages as the prior action. This lawsuit is currently pending.

4. *The 2015 Action*

On April 21, 2015, Morillo submitted a third Government Code claim to the City. The claim alleged the City “intentionally or negligently misrepresented and/or concealed material Project budget and financing information” resulting in damages of approximately \$3 million. The claim was received by the City on April 24, 2015.

Six days later, before the City had rejected the claim, Morillo filed the current action against the City and City employees Phyllis Currie, Shari Thomas, Steven Wright, and Segun Abegunrin (collectively, respondents).¹ Morillo alleged fraud and negligence against the individual defendants, and sued the City for breach of contract, breach of the covenant of good faith and fair dealing, and “statutory penalties” arising from the breach of contract.

The operative second amended complaint (SAC) in the present action alleged that the City failed to budget for “soft costs” for the project “such as architectural fees, permits, and City staff time.” Several months after Morillo began work on

¹ Morillo acknowledges that it filed this action before the City rejected its corresponding Government Code claim. We note that such a premature filing was in violation of Government Code section 945.4 which provides that “no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefor has been presented to the public entity *and has been acted upon by the board, or has been deemed to have been rejected by the board . . .*” (Italics added.) Exhaustion of *administrative* remedies is “‘a jurisdictional prerequisite to resort to the courts.’ [Citation.]” (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.) The parties have not addressed this issue, nor do we.

Phase 1 of the project, respondents discovered the City's failure to budget for soft costs and that the City had used \$5 million of funds designated for Phase 2 to pay for soft costs. Although respondents told Morillo Phase 2 was cancelled for "lack of funds," they did not explain that "the City had failed to allocate any funds for its own soft co[s]ts" and had used "funds allocated for Morillo's contract in order to pay itself back for soft cost[s]."

Respondents demurred arguing that the action was based on the same primary right as Morillo's previous claims for "nonpayment of contract amounts relating to deletion" of Phase 2. According to respondents, the action was time-barred because Morillo's most recent Government Code claim against the City—filed in 2015—had not been filed within a year of the alleged contractual breaches—the City's February 2010 deletion of Phase 2 of the contract and March 2011 refusal to pay Morillo for Phase 2. In opposition, Morillo argued that its claims did not accrue until 2015 when City employees revealed in depositions that the City had not budgeted for soft costs but had instead used money designated for Phase 2 to pay those costs.

The trial court sustained the demurrer without leave to amend. The court held that Morillo "knew by February 10, 2010 that the [City] was terminating [Phase 2] due to a budget shortfall and that [Morillo] knew that it ha[d] not been paid these funds by November 23, 2012 [when Morillo received its final payment under the contract] [Morillo] seeks \$3,076,946.45 for the deleted [Phase 2] work based on [the City's] budget shortfall. This is a single primary right and the violation of it gives rise to a single cause of action. . . . [Morillo] did not file a timely claim against the [City] for these damages and its [SAC] is

barred. There are no grounds to split a new claim from the barred claim”

Judgment was entered for respondents. Morillo timely appealed.

DISCUSSION

1. Standard of Review

“On appeal from an order dismissing a complaint after the sustaining of a demurrer, we review the pleading to determine whether the facts alleged state a cause of action under any possible legal theory. [Citation.] We give the complaint a reasonable interpretation, ‘treat[ing] the demurrer as admitting all material facts properly pleaded,’ but do not ‘assume the truth of contentions, deductions or conclusions of law.’ [Citation.] We liberally construe the pleading with a view to substantial justice between the parties.” (*Staniforth v. Judges’ Retirement System* (2016) 245 Cal.App.4th 1442, 1449.)

2. The Government Claims Act

The Government Claims Act (Gov. Code, § 810 et seq.) provides that a person seeking to sue a local public entity for damages must generally first present a claim to the entity. (*Id.*, §§ 905, 905.2, 915, subds. (a), (b), 945.4.) To sue a public employee on the basis of acts or omissions in the scope of the defendant’s employment, the plaintiff must also first file a claim against the public-entity employer. (*Briggs v. Lawrence* (1991) 230 Cal.App.3d 605, 613.) A claim for monetary damages based on a breach of contract must be presented to the public entity not later than one year after the accrual of the cause of action. (Gov. Code, § 911.2, subd. (a); *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746, fn.13.) “[F]ailure to timely present a claim for money or damages to a public entity bars a plaintiff from

filing a lawsuit against that entity.” (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239.)

“The public entity must act on the claim within 45 days after the claim was presented, unless the parties agree to extend the period. (Gov. Code, § 912.4, subds. (a), (b).) If the public entity fails to act within the time provided, the claim is deemed rejected. (*Id.*, § 912.4, subd. (c).)” (*County of Los Angeles v. Superior Court* (2008) 159 Cal.App.4th 353, 360.) “ ‘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.’ [Citation.]” (*Cal. Rest. Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, 1591.) Any suit brought against a public entity on a claim for monetary damages must be filed not later than six months after the date the public entity has rejected the claim in writing. (Gov. Code, § 945.6, subd. (a)(1).)

3. *Morillo’s Tort Claims Arise From the Same Primary Right as its Prior Claims for Breach of Contract*

Morillo does not dispute that its prior claims for breach of contract against the City accrued at the latest when the City rejected Morillo’s claim for “final payment” for Phase 2 in March 2011. Accordingly, under the Government Claims Act, Morillo was required to file a claim with the City for damages arising from that breach within a year—by March 2012. In fact, Morillo did file a Government Code claim for damages arising from the City’s breach in March 2011. That claim was denied the following month. Morillo then had six months under Government Code section 945.6 to file a lawsuit based on that claim. It attempted to do so by filing a Doe amendment in the first lawsuit, adding the City as a cross-defendant to its breach of

contract claim. Following our issuance of an alternative writ, judgment was entered for the City on that cross-complaint.

Morillo's current lawsuit arises from its third Government Code claim against the City filed in April 2015. Morillo filed suit the following month. The trial court here sustained the demurrer on the ground that Morillo's April 2015 claim to the City was untimely given that its contractual claims against the City had accrued several years earlier.

If the current lawsuit involves the same primary right as the first suit, then Morillo's Government Code claim is untimely by more than three years because the claim accrued in March 2011 when Morillo understood the City would make no further payments on the contract. If the current action involves separate primary rights arguably both the filing of the 2015 Government Code claim with the City and the current lawsuit are timely.

Morillo contends the trial court erred in concluding that its current claims arose from the same primary right as its prior contractual claims such that the present action was untimely. According to Morillo, "the City's breach of contract for failing to pay is separate from the primary right not to have Morillo's project funds stolen"—Morillo characterizes the individual respondents' use of funds from the project's budget to pay "soft costs" as theft. Morillo argues that because a separate primary right is at issue in this lawsuit, the action is not time-barred; Morillo timely filed its Government Code claim in April 2015 within a year of its discovery of respondents' fraud and negligence. We disagree.

We start with a general discussion of primary rights. "Causes of action are considered the same if based on the same primary right." [Citation.] "[T]he primary right is simply the

plaintiff's right to be free from the particular injury suffered.” ’ [Citation.] ‘Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right.’ [Citation.]” (*Hi-Desert Medical Center v. Douglas* (2015) 239 Cal.App.4th 717, 733.) “A ‘plaintiff’s primary right is defined by *the legally protected interest* which is harmed by defendant’s wrongful act, and is not necessarily coextensive with the *consequence* of that wrongful act.’ [Citation.]” (*Fujifilm Corp. v. Yang* (2014) 223 Cal.App.4th 326, 331–332 (*Fujifilm*).)

In the current action, Morillo is again suing the City to recover damages caused by the City’s failure to pay Morillo for Phase 2 of the contract. The essence of the action is still that the City’s cancellation of Phase 2 due to budget woes harmed Morillo. The difference between this action and the first action is only that Morillo now alleges those budget woes were the result of respondents’ negligent and fraudulent conduct. Its proffered *reasons* for why the City breached the contract, even if recently uncovered, do not create a second primary right.

Morillo relies on *Sawyer v. First City Financial Corp.* (1981) 124 Cal.App.3d 390 (*Sawyer*) and *Fujifilm, supra*, 223 Cal.App.4th 326 to support its argument that the City’s breach of contract violated a separate primary right than Morillo’s right to be free from respondents’ tortious conduct. In *Sawyer*, the plaintiffs sold real property to a purchaser who sought to develop it. The purchaser paid the purchase price part in cash and part by note secured by a deed of trust. Concurrent with the sale, the purchaser took out a development loan from a bank secured by a first deed of trust on the property. The sellers

subordinated their deed of trust to the new encumbrance.
(*Sawyer*, at p. 395.)

After the purchaser failed to develop the land and defaulted on the development loan, the bank foreclosed on the property. The property sold at the foreclosure sale for less than the amount due on the first deed of trust. The sellers then sued the purchaser for breach of contract alleging they were third party beneficiaries of the development loan agreement and had been damaged by the purchaser's failure to perform under the agreement. (*Sawyer, supra*, 124 Cal.App.3d at pp. 396–397.)

While that suit was pending, the sellers brought a second lawsuit based upon an alleged conspiracy between the purchaser and bank to cause a default on the bank's note and trust deed, and hold a sham foreclosure sale for the purpose of eliminating the purchaser's obligation to the sellers under the sellers' deed of trust. The trial court refused to consolidate the matters, and judgment was entered for the purchaser and bank in the first action. The trial court then held that judgment was *res judicata* to the issues in the second action. (*Sawyer, supra*, 124 Cal.App.3d at p. 398.)

The Court of Appeal reversed, holding that the two actions involved separate primary rights. The court concluded that “the basis of the claim” in the second action “is completely different, and rests upon a completely separate set of facts.” (*Sawyer, supra*, 124 Cal.App.3d at p. 402.) “The first action is solely on contract and is based upon the note, deed of trust, and loan and development agreement. . . . The core of the alleged wrongful conduct [in the second action] is an agreement among the parties to conduct what is characterized as a sham foreclosure sale, the only substantive effect of which would be secretly to discharge

the obligation to [the sellers], leaving all other parties in essentially the same position as prior to the sale. Surely one's breach of contract by failing to pay a note violates a 'primary right' which is separate from the 'primary right' not to have the note stolen. . . . While the monetary loss may be measurable by the same promissory note amount, and hence in a general sense the same 'harm' has been done in both cases, theoretically the plaintiffs have been 'harmed' differently by tortious conduct destroying the value of the note, than by the contractual breach of simply failing to pay it." (*Id.* at pp. 402–403.)

Unlike *Sawyer*, we cannot say that "the basis" of the claims in the current action "is completely different, and rests upon a completely separate set of facts" than Morillo's claims arising from the City's alleged breach of contract in 2011. (*Sawyer*, *supra*, 124 Cal.App.3d at p. 402.) The new causes of action are based on the same acts and the same harm as Morillo's prior claims against the City. Morillo acknowledges that it is seeking to recover the same damages alleged in its first lawsuit against the City; it disputes that the targeted actions are the same.

Morillo's original claims for breach of contract arose after the City cancelled Phase 2 of the project due to the City's budget shortfall. Morillo's current claims target the respondents' actions that *caused* the budget shortfall—respondents' alleged negligent budgeting and fraudulent use of funds to pay costs other than Morillo's work. Morillo is parsing respondents' actions in an attempt to create a new claim. The claim remains that the City's cancellation of Phase 2 harmed Morillo.

Morillo's reliance on *Fujifilm*, *supra*, 223 Cal.App.4th 326 is also unavailing. In that case, the plaintiff first sued the defendant for breach of a settlement agreement based on the

defendant's failure to pay the settlement. (*Id.* at p. 329.) The plaintiff then filed a second lawsuit alleging the defendant had engaged in fraudulent transfers in order to frustrate the plaintiff's ability to enforce the settlement agreement. (*Id.* at p. 330.) The Court of Appeal found two different primary rights at issue: "the right to have contractual obligations performed is distinct from the right to be free from tortious behavior preventing collection of a judgment." [Citation.]" (*Id.* at p. 332.)

The present case is distinguishable from *Fujifilm*. In that case, the court drew a distinction between the right to have contractual obligations performed and the right to be free from tortious behavior preventing collection of a judgment. Here, respondents' alleged tortious behavior was the "cause" of the City not performing the very same contract Morillo earlier sued the City for breaching. The alleged tort was inseparable from the City's failure to perform the contract.

We conclude that Morillo's alleged tort claims arise from the same primary right as Morillo's long ago dismissed cause of action for breach of contract. Accordingly, Morillo's action is time-barred because the causes of action accrued in 2011 and this action was not timely filed within six months of the City's denial of Morillo's 2011 Government Code claim.

4. *The Individual Respondents*

Morillo contends that even if its claims against the City are time-barred, its claims against the individual employees are not. Specifically, Morillo argues that no Government Code claim was required as to the individual respondents because their tortious actions were not within the scope of their employment.²

² Morillo also contends that Abegunrin was "an outside consultant and *not* an employee potentially entitled to

Morillo’s fraud claims against the individual respondents arise from those employees’ alleged concealment of “material facts and errors” related to the project’s budget. “A fraud claim based upon the suppression or concealment of a material fact must involve a defendant who had a legal duty to disclose the fact. [Citation.]” (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1186.) Under this test, Morillo’s contention fails for two reasons. First, Morillo has not alleged facts showing these employees had a legal duty—aside from duties that arose in connection with their actions *on behalf of* the City—to inform Morillo of material facts about the construction project. Second, Morillo’s negligence claim alleges only that the individual respondents negligently allocated the budget. The claim does not allege any duty by those employees other than in their capacity as agents for the City. (See *Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 463 [“The existence of a duty is the threshold element of a negligence cause of action. [Citation.]”].) Accordingly, the operative complaint does not allege grounds for suing the individual respondents based on actions outside the scope of their employment.

governmental immunity.” (Emphasis added.) However, the operative complaint in this action alleged that “Abegunrin[] was at all pertinent times alleged herein concerning the Project employed by the City” The allegations of the pleading control over the plaintiff’s contentions when we review a court’s order sustaining a demurrer.

DISPOSITION

The judgment is affirmed. Morillo is to pay respondents' costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

GRIMES, J.

SORTINO, J.*

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