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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ONAREE BEE RUNGTIWA et al.,

Plaintiffs and Appellants,

v.

GREGORY L. GEISER et al.,

Defendants and Respondents.

B281329

(Los Angeles County
Super. Ct. No. YC070418)

APPEAL from an order of the Superior Court of
Los Angeles County. Stuart M. Rice, Judge. Reversed and
remanded with directions.

Law Offices of Larry G. Lushanko, Larry G. Lushanko and
Brittney L. Lushanko for Plaintiffs and Appellants.

Dinsmore and Sandelmann, Frank Sandelmann and
Joshua A. Valene for Defendants and Respondents.

Onaree Bee Rungtiwa and Blaine Snider (Appellants) appeal from the trial court's order of dismissal following a partially successful demurrer to their complaint. Appellants purchased a residence from defendant Ocean Ridge Equities, LLC (ORE). Appellants claim that ORE breached the sales contract and that ORE along with other defendants committed various torts by misrepresenting the condition of the residence.

The only claims at issue on this appeal are Appellants' claims against respondent Gregory L. Geiser, an owner and managing member of ORE. Appellants allege that Geiser is liable both on an alter ego theory and as a result of his alleged personal participation in the torts. The trial court ruled that Appellants' operative complaint stated claims against ORE and other defendants, but did not adequately allege any claim against Geiser personally.

We reverse. Appellants have adequately alleged that Geiser personally participated in fraudulent conduct by concealing facts concerning mold and water intrusion in the residence and by failing to disclose the true condition of the property in a mandatory disclosure form that he signed. The trial court therefore should have overruled the demurrer with respect to Appellants' claims against Geiser.

BACKGROUND

1. Appellants' Allegations¹

Appellants allege that ORE acquired a residential property located on Falda Avenue in Torrance (the Residence) through a

¹ The allegations are taken from Appellants' third amended complaint (Complaint).

foreclosure sale in 2014 “for the purpose of renovating and flipping it.” ORE performed major renovations to the property “without obtaining a permit from the City of Torrance Building Department as require[d] by law.” Much of the renovation work was defective and not to code.

ORE listed the Residence for sale in November 2014 at a price of \$650,000 through its broker, Polly Watts. Watts is affiliated with Maxim Properties (Maxim) and is also one of the owners of ORE. The Complaint names both Watts and Maxim as defendants along with ORE and Geiser (collectively, Defendants). Geiser is the “managing member” of ORE.

ORE accepted an offer for the Residence from a couple, the Kelleys, who discovered mold and water intrusion. The Kelleys hired a company named Mold Technical Services, Inc. (MTS) to do mold testing. MTS prepared a report (the Kelley MTS Report) which included a detailed description of water damage and “fungal growth” in the Residence. The Kelleys provided a copy of the report to Watts and Maxim.

The Kelleys requested that ORE fix the problems. ORE refused, leading to cancelation of the escrow. ORE “immediately” put the Residence back on the market at the same price of \$650,000.

In January 2015, Appellants agreed to purchase the Residence for \$675,000. During escrow, Watts and Geiser provided statutorily mandated disclosures which failed to reveal the water and mold problems or the existence of the Kelley MTS Report.

Four days before the close of escrow, Appellants discovered “significant water intrusion and mold” in the Residence after a rain. Appellants demanded that ORE remediate the mold and

repair the Residence. ORE refused “and instead tried to cancel escrow.”

In February 2015 Appellants filed this action, seeking specific performance. In September 2015 Appellants “elected to close escrow and continue this action for damages.”

2. The Trial Court’s Ruling

Appellants filed their Complaint after various demurrers and amendments to previous iterations of their claims. The Complaint alleges nine causes of action, including a breach of contract claim against ORE and various theories of fraud and misrepresentation against ORE and the other Defendants.

Defendants demurred on several grounds, including that the Complaint does not adequately state a claim against the individual defendants, Geiser and Watts, on an alter ego theory. In opposing the demurrer, Appellants argued both that their alter ego allegations were sufficient and that Geiser and Watts could be personally liable under Corporations Code section 17703.04, subdivision (c), for their own participation in the alleged torts. Appellants also requested leave to amend their alter ego allegations if necessary to include facts that they recently learned in the depositions of Geiser and Watts.

In an order dated February 9, 2017 (Order), the trial court overruled the demurrer in part and sustained it in part.² The court concluded that the Complaint adequately alleged a breach of contract claim against ORE. The court also overruled the demurrer with respect to all but one of the claims against Watts.

² The Order adopted the trial court’s tentative ruling issued at the hearing on the demurrer on November 14, 2016.

However, the trial court sustained the demurrer without leave to amend as to Geiser on the three causes of action in which he is named. With respect to Appellants' alter ego theory, the trial court ruled that the "boilerplate allegations of alter ego" stated only conclusions rather than facts and were therefore inadequate. With respect to Appellants' theory of personal liability against Geiser for misrepresentations about the Residence, the trial court concluded that Geiser was not the seller of the Residence and Appellants therefore had not sufficiently alleged that he breached any statutory or fiduciary duty. The court also found that Appellants "failed to allege adequate facts to show that Geiser actively participated in the tortious conduct as an individual for the purpose of surviving demurrer." The court reasoned that the Complaint is inconsistent with such a contention because it alleges that Geiser signed the allegedly false disclosures "as managing member of ORE."

DISCUSSION

1. Appealability

The Order contains a caption identifying it as an "order overruling in part, and sustaining without leave to amend in part" the defendants' demurrer. There is no right of appeal from an order sustaining or overruling a demurrer. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695.) There is no judgment in the record. (See Code Civ. Proc., § 904.1.)

We therefore must consider whether there is an appealable order.³ While a ruling on a demurrer is not appealable, we may

³ Pursuant to Government Code section 68081, we notified the parties that the court was considering this issue. The parties submitted letter briefs which both agreed that the trial court's

treat an order dismissing a party following a successful demurrer as an appealable judgment. (*Beazell v. Schrader* (1963) 59 Cal.2d 577, 579–580; *Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1290–1291.) The Order here states that “Defendant GEISER is dismissed with prejudice.” Thus, it appears that there is a final order with respect to Geiser, and we therefore treat the Order as an appealable final judgment with respect to him. (See *Justus v. Atchison* (1977) 19 Cal.3d 564, 568 [“the rule requiring dismissal does not apply when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party”].)

The same is not true for Watts. The Order states that “Defendant WATTS is dismissed with prejudice as to Plaintiffs’ Second Cause of Action only.” The trial court overruled the demurrer with respect to Watts on Appellants’ third through ninth causes of action, which remain pending against her. Thus, there is no final order as to Watts. We therefore lack jurisdiction to consider an appeal from the trial court’s Order concerning her. (See *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696 [a reviewing court has jurisdiction over a direct appeal only when there is an appealable judgment or order].)

2. Standard of Review

An order sustaining a demurrer is reviewed de novo to determine whether the complaint states a cause of action as a matter of law. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494,

Order should be treated as a final, appealable order with respect to Geiser. While the parties also suggest we consider the appeal with respect to Watts, as discussed below we lack jurisdiction to do so.

1501.) On appeal, we “‘treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.’” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

When a trial court sustains a demurrer without leave to amend, the court’s decision not to permit further amendment is reviewed for abuse of discretion. (Code Civ. Proc., § 472c, subd. (a); *Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947.) If the complaint does not state facts sufficient to constitute a cause of action, the appellate court must determine whether there is a reasonable possibility that the defect can be cured by amendment. (*Ellenberger*, at p. 947.)

3. Allegations Concerning Geiser’s Personal Involvement in the Alleged Torts

The Complaint alleges that Geiser is the “managing member” of ORE, which is a limited liability company. Corporations Code section 17703.04 addresses the personal liability of members of limited liability companies. That section provides that the “debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort, or otherwise” do not “become the debts, obligations, or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager for the limited liability company.” (Corp. Code, § 17703.04, subd. (a)(2).) However, that section also states that nothing in it “shall be construed to affect the liability of a member of a limited liability company to third parties for the member’s participation in tortious conduct.” (Corp. Code, § 17703.04, subd. (c).)

These provisions are consistent with the general legal principle that corporate officers and directors cannot be held vicariously liable by virtue of their position for torts committed by

the corporation, but they may be liable for their *own* conduct if they actively participate in a tort. (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 503–504 (*Frances T.*)). As the court explained in *Frances T.*, this rule “has its roots in the law of agency.” (*Id.* at p. 505.) An agent is “‘liable for his own acts, regardless of whether the principal is liable or amenable to judicial action.’” (*Ibid.*, quoting *James v. Marins Corp.* (1944) 25 Cal.2d 721, 742–743.)

For example, in *Frances T.* the court held that a plaintiff who had been attacked in her condominium had stated a negligence claim against directors of the condominium owners association. The directors allegedly had specific knowledge of inadequate lighting but failed to address the problem and actually exacerbated it by enforcing condominium rules that prevented the plaintiff from using her own lights. (*Frances T.*, *supra*, 42 Cal.3d at pp. 509–510.) Similarly, the court in *Michaelis v. Benavides* (1998) 61 Cal.App.4th 681 held that the plaintiff could pursue a negligence claim against the president and majority owner of a corporation engaged in the concrete business based upon the individual defendant’s alleged personal participation in the flawed construction of the plaintiff’s patio and driveway. (*Id.* at p. 686.) Citing *Frances T.*, the court concluded that “[t]he corporate fiction was never intended to insulate officers from liability for their own tortious conduct.” (*Michaelis*, at p. 688.)

The court in *People v. Pacific Landmark, LLC* (2005) 129 Cal.App.4th 1203 applied this principle to the manager of a limited liability company. Interpreting former Corporations Code section 17158, the court held that, while managers of limited liability companies may not be held liable for the conduct of their companies merely because of their corporate status, “they may

nonetheless be held accountable . . . for their personal participation in tortious or criminal conduct, even when performing their duties as manager.” (*Id.* at p. 1213.) The court held that a preliminary injunction prohibiting prostitution on property owned by a limited liability company properly named a manager of the company who was personally involved in “aiding and abetting the nuisance.” (*Id.* at pp. 1206–1207, 1216–1217.)

Applying the general principle to this case, we hold that Appellants have adequately stated causes of action against Geiser based upon his alleged personal participation in the torts. Appellants allege that Geiser had personal knowledge of the problems with the Residence. They allege that, during the course of renovations to the residence, Geiser “became aware of certain defects in the Falda Residence, which included mold, mildew, current water intrusion, damage to the structure from prior water intrusion, and defects in the windows, roof and deck that gave rise to the mold and water damage.” More specifically, appellants claim that Geiser was aware of the contents of the Kelley MTS Report, which detailed the mold and water intrusion.

Appellants also allege that despite his knowledge of the condition of the Residence, Geiser participated in making representations that concealed the problems. Geiser allegedly “filled out the standard and usual disclosure statements required by law,” which did not disclose the problems in the Residence. These disclosures allegedly included a “‘Real Estate Transfer Disclosure Statement’ dated January 7, 2015” (TDS) that Geiser signed. The TDS stated that ORE was not aware of (1) “‘any significant defects/malfunctions’” in the walls, ceilings, floors, windows and other structural features of the residence; (2) mold or water damage; or (3) non-permitted modifications. The TDS also stated that ORE’s disclosures were based only on a limited

visual inspection of the property. Geiser allegedly knew that all these representations were false based on his involvement in the renovations of the Residence and his awareness of the Kelley MTS Report.⁴

Thus, the Complaint alleges that Geiser personally made material representations on behalf of ORE about the condition of the Residence that he knew were false. This allegation is

⁴ Geiser argues that the Complaint alleges only that Geiser acted as a managing member of ORE and does not allege that he had *personal* knowledge of the allegedly false statements. This argument simply ignores the allegations of the Complaint. For example, in paragraph 39, the Complaint alleges that Geiser was aware that statements in the TDS concerning the claimed lack of defects in the Residence were false: “Notwithstanding the MTS Mold Report obtained by Defendant Geiser and Defendant Watts from James and Tracey Kelley, Defendants Geiser and Watts checked the box on the TDS “No” denying any knowledge of the existence of the mold and water damage to the walls, ceiling, and floors from the water intrusion, and the defective roof, windows, decks, and doors causing the water intrusion. Said Defendants were aware of the Material Defects from the MTS Mold Report provided to them from the Kelleys.” Later in that same paragraph the Complaint alleges: “Said Defendants Geiser and Watts had *extensive personal knowledge* of the condition of the Falda Residence in that Defendants ORE, Watts and Geiser ‘renovated the Residence from top to bottom’ [a]s stated on the MLS flyer. Moreover, Defendants Geiser and Watts had knowledge of the defects from the disclosures made to them by the Kelley MTS Report.” (Italics added.) Paragraph 46 adds that “Defendants ORE, Geiser and Watts knew that the representations made by them in the TDS (as set forth in paragraph 39) were false.”

sufficient to state a claim against Geiser for his alleged personal participation in tortious conduct for each of the causes of action in which he is named.

Geiser is named in Appellants' second, third, and fourth causes of action. Each of those causes of action alleges a variety of fraud. The second cause of action alleges a claim for violation of certain Civil Code provisions requiring specific disclosures in the transfer of residential property. (See Civ. Code, §§ 1102–1102.18.)⁵ The third and fourth causes of action allege claims for common law fraud.

Under Civil Code section 1102.6, sellers of residential property must provide disclosures about their property on a statutorily prescribed form. (*Id.*; see *Calemine v. Samuelson* (2009) 171 Cal.App.4th 153, 162.) The purpose of these required disclosures is not to alter a seller's common law duties of disclosure, but to “make the required disclosures specific and clear.” (*Calemine*, at pp. 161–162.) The disclosures must be made “in good faith,” meaning “honesty in fact in the conduct of the transaction.” (Civ. Code, § 1102.7; *Calemine*, at p. 162.) Among other things, the statutory form requires disclosure of (1) “significant defects/malfunctions” in the structural features of the residence; (2) “[s]ubstances, materials or products which may be an environmental hazard,” including mold; and (3) “[f]looding,

⁵ The second cause of action in the Complaint cites only Civil Code section 1102. That section simply sets forth the scope of the article in which it is found. However, as the trial court noted, Appellants apparently intended to base their second cause of action on the statutory duties of disclosure described in subsequent sections, particularly Civil Code section 1102.6.

drainage or grading problems.” (Civ. Code, § 1102.6.) As discussed above, the Complaint alleges that ORE’s statutorily required disclosures in the TDS concealed the existence of such problems.

While ORE, not Geiser, was the seller of the Residence, Geiser allegedly signed the TDS. His alleged personal knowledge of and participation in false representations in that form is sufficient to support each of the fraud claims alleged against him.

The principle that corporate officers may be personally liable for torts in which they participate applies to intentional torts such as fraud. (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 785 [officers and directors involved in mortgage fraud could be personally liable]; *PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1380, 1385–1386 [officers and directors could be personally liable for misappropriation of trade secrets that they knew about and failed to prevent].) The Complaint adequately alleges such personal participation based upon Geiser’s knowledge of false representations in the form that he signed. Geiser allegedly made these false representations “with the intent to induce Plaintiffs to act in . . . reliance thereon.” (See Civ. Code, § 1709 [“One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers”].) As a managing member of ORE, Geiser also allegedly caused ORE (the seller) to make false representations about the condition of the Residence in the TDS. (See *PMC*, at p. 1380 [“A corporate director or officer’s participation in tortious conduct may be shown not solely by direct action but also by knowing consent to or approval of unlawful acts”].)

4. Alter Ego Allegations

Appellants also argue that the trial court erred in finding that their allegations were not sufficient to state a claim against Geiser on an alter ego theory, and in denying Appellants' request to amend to allege additional facts concerning alter ego. We need not consider that argument. "Ordinarily, a general demurrer may not be sustained . . . as to a portion of a cause of action." (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167.) Appellants did not file a motion to strike the alter ego allegations. Thus, our conclusion that the trial court should have overruled the demurrer based on Geiser's alleged personal involvement in the torts makes it unnecessary to consider any other theory of liability. (*Id.* at p. 1169 [declining to consider the sufficiency of other alleged misrepresentations after concluding that one misrepresentation was sufficiently alleged].)

Nevertheless, for purposes of further proceedings below, we note that, at least based on the record as presented to this court, Appellants do not appear to have evidence supporting an alter ego theory. Appellants argued below that Geiser's deposition testimony provided facts on which to permit a further amendment to the Complaint to allege alter ego liability. However, the deposition testimony on which Appellants rely at most supports the conclusions that (1) an entity other than ORE actually performed the renovations to the Residence; (2) various entities share an office; and (3) Geiser is unaware of many facts concerning the corporate relationships, ownership, business activities and management of various corporate entities with which he is affiliated. We see no abuse of discretion in the trial court's conclusion that this evidence was insufficient to support an alter ego claim. Geiser's deposition testimony does not itself support a conclusion that he has disregarded the corporate form

or that treating the challenged acts as those of the corporation would cause an inequitable result. (See *CADC/RADC Venture 2011-1 LLC v. Bradley* (2015) 235 Cal.App.4th 775, 788–789.) We leave for the trial court to decide, if necessary, whether Appellants provide sufficient additional evidence supporting their alter ego theory at some later stage of the litigation, assuming they choose to pursue it.

DISPOSITION

The trial court's February 9, 2017 order is reversed only insofar as it: (1) sustains the demurrer to the second, third and fourth causes of action in the Third Amended Complaint against defendant Gregory L. Geiser, and (2) dismisses Geiser from the action. In all other respects the trial court's ruling on the demurrer to the Third Amended Complaint remains in effect. The case is remanded for further proceedings on the plaintiffs' remaining causes of action. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.