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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

TIMOTHY RUSSELL CRANE etc. et al., Plaintiffs, Cross-defendants and Respondents, v. NANCY JOHNSON, Defendant and Cross-complainant; LEONARD S. SANDS et al., Appellants.	B233187 (Los Angeles County Super. Ct. No. SC107921)

APPEAL from an order of the Superior Court of Los Angeles County, Jacqueline A. Connor, Judge. Affirmed.

Sands & Associates, Leonard S. Sands, Heleni E. Suydam and Diallo K. Scott for Appellants.

Ecoff Blut, Lawrence C. Ecoff and Philip H.R. Nevinny for Plaintiffs, Cross-defendants and Respondents.

INTRODUCTION

Appellants Leonard S. Sands and Diallo K. Scott, counsel for Nancy Johnson, defendant in the underlying action, appeal from an order of the trial court awarding monetary sanctions under Code of Civil Procedure section 128.7.[1] We affirm the award of sanctions.

FACTUAL AND PROCEDURAL BACKGROUND

On December 24, 2005, Nancy Johnson (Johnson) and her husband, as buyers, and Timothy Russell Crane and Michael Patrick Crane (respondents), as sellers, entered into an installment contract of sale with power of sale (Installment Contract) for the purchase of real property in Venice, California for $4.2 million. Pursuant to the terms of the Installment Contract, Johnson agreed to pay this amount by (1) an initial security deposit in the sum of $500,000, and (2) the balance of $3,700,000 in monthly installments of $20,000 per month. The Installment Contract also provided that respondents would retain legal title to the property as a security interest in the property until Johnson paid the balance of the purchase price. Upon entering into the agreement, Johnson paid the security deposit, and took possession of the property.

In February 2009, Johnson defaulted on the Installment Contract by failing to make monthly payments and pay property taxes, and by failing to pay the balance of the loan. Pursuant to the Installment Contract, Johnson owed respondents the unpaid balance of over $4 million.

On July 27, 2009, Johnson and respondents signed a rescission agreement. The rescission agreement states, in relevant part:

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[1] Although the notice of appeal lists only Nancy Johnson, we liberally construe it to include appellants. (*Beltram v. Appellate Department* (1977) 66 Cal.App.3d 711, 715-716; see, e.g., *Chung Sing v. Southern Pacific Co.* (1918) 178 Cal. 261, 263-264.)

"**NOW THEREFORE, FOR VALUABLE CONSIDERATION,** the receipt and sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

"1. **Rescission of Installment Contract**. The Installment Contract is hereby rescinded, and of no further force and effect, with no further rights or obligations by and between the parties, except as expressly set forth in this Agreement. . . . [¶] . . . [¶]

"3. **Mutual General Release**. Upon mutual execution and delivery of this Agreement . . . , Seller, on the one hand, and Buyer, on the other hand . . . hereby release each other . . . from any and all claims, demands, debts, losses, obligations, liabilities, costs, expenses, rights of action and causes of action, of any kind or character whatsoever . . . that arose prior to the date hereof . . . ."

At some time after the execution of the agreement, Johnson indicated to respondents that she held an interest in the property. On May 7, 2010, respondents filed a complaint for declaratory relief against Johnson and her husband seeking, among other things, the removal of the Installment Contract from the chain of title for the property.

On July 23, 2010, Johnson filed her answer to respondents' complaint and filed a cross-complaint for rescission. On November 3, 2010, the trial court sustained respondents' demurrer to the cross-complaint with leave to amend. The court ruled that "[defendant] has failed to allege sufficient facts to support rescission other than alleging facts that are directly contradicted by completely unambiguous provisions in the Rescission Agreement."

On November 23, 2010, Johnson filed her first amended cross-complaint. The amended pleading maintained the same legal theory as in the original cross-complaint, but further alleged that defendant was not reimbursed for $1.5 million of improvements she made to the property, for her $500,000 deposit, or for any portion of the monthly payments she made on the property.

On November 29, 2010, respondents informed appellants of the alleged legal deficiencies in Johnson's first amended cross-complaint and offered 21 days to withdraw

the pleading.[2] Respondents informed appellants that "[f]irst and foremost, [the first amended cross-complaint] suffers from the identical flaw that compelled this Court to dismiss the original Cross-Complaint. The newly added allegations to the First Amended Complaint regarding 'failure of consideration' are directly contracted by the unambiguous provisions of the Rescission Agreement . . . . [¶] In addition, [Johnson's] newly added allegations do not establish a failure of consideration, but a half-hearted claim of insufficiency of consideration, which cannot, as a matter of law, support an action for rescission."

Respondents filed a demurrer as well. They claimed that the newly-added allegations, like the original allegations, were directly contradicted by the unambiguous provisions of the rescission agreement.

On December 20, 2010, Johnson filed her opposition to respondents' demurrer. She argued that the allegations of the first amended cross-complaint "permissibly" contradicted the provisions of the rescission agreement.

In response, on December 22, 2010, respondents filed their motion for sanctions pursuant to Code of Civil Procedure section 128.7.[3] They claimed that the first amended cross-complaint was both meritless and frivolous, in that it suffered from the same defect as the original complaint.

On January 4, 2011, the trial court sustained respondents' demurrer without leave to amend, ruling:

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[2] Code of Civil Procedure section 128.7, subdivision (c)(1), provides in pertinent part, that "[a] motion for sanctions under this section shall be made separately from other motions or requests," and that "[n]otice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected."

[3] All further statutory references are to the Code of Civil Procedure.

"The bottom line is that [Johnson] has failed to allege any facts showing that the consideration she was supposed to receive pursuant to the Rescission Agreement was anything other than a release of all further obligations under the Installment Contract. . . .

"The Court finds that [Johnson] cannot properly allege a failure of consideration in light of two main factors: (1) the express release of [Johnson] from her obligation to pay [respondents] the $3.7 million and other unpaid sums pursuant to the Installment Contract, which was the material term of the Rescission Agreement; and (2) nothing in the Rescission Agreement and no factual allegations to support the contention that any other consideration was contemplated by the parties."

The following day, Johnson filed her opposition to respondents' motion for sanctions. She reiterated the position she took in opposition to the demurrer. In addition, she claimed the sole purpose of respondents' request for sanctions was to intimidate her into withdrawing her first amended cross-complaint, and for that she requested an award of monetary sanctions under section 128.7.

On January 19, 2011, the trial court granted respondents' motion, awarding sanctions in the amount of $3,580. The court explained that "[t]he claims presented in the amended cross-complaint were not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law and the allegations did not have any [or] were not likely to have evidentiary support for the same reasons set forth in the demurrer to the original cross-complaint and the ruling thereon. The sole reasonable conclusion from these findings is that the amended cross-complaint was filed primarily for an improper purpose; to harass, cause unnecessary delay and needlessly increase the cost of litigation."

On March 14, 2011, trial was held on the declaratory relief action. The court issued a judgment in favor of respondents based on the trial briefs submitted by appellants and respondents.

DISCUSSION

Appellants contend that the trial court erred in granting respondents' motion for sanctions. We disagree.

Section 128.7, subdivision (b), states in pertinent part: "By presenting to the court . . . by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: [¶] (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. [¶] (2) The claims, defenses, and other legal contentions therein are warranted by existing law . . . . [¶] (3) The allegations and other factual contentions have evidentiary support . . . ."

Violation of any of these certifications may give rise to sanctions. (*Eichenbaum v. Alon* (2003) 106 Cal.App.4th 967, 976.) "The purpose of section 128.7 is to deter frivolous filings." (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 826.)

"Under section 128.7, '[a] party seeking sanctions must follow a two-step procedure. First, the moving party must serve on the offending party a motion for sanctions. Service of the motion on the offending party begins a [21]-day safe harbor period during which the sanctions motion may not be filed with the court. During the safe harbor period, the offending party may withdraw the improper pleading and thereby avoid sanctions. If the pleading is withdrawn, the motion for sanctions may not be filed with the court. If the pleading is not withdrawn during the safe harbor period, the motion for sanctions may be filed.'" (*Martorana v. Marlin & Salzman* (2009) 175 Cal.App.4th 685, 698, fn. omitted.) The statute providing for sanctions for frivolous filings is not designed to be punitive in nature; rather, the goal is to avoid sanctions by withdrawal of the improper pleading during the safe harbor period. (*Id*. at p. 699.)

In the instant case, there is no question that the safe harbor provision was complied with. A letter seeking withdrawal of the first amended cross-complaint was

sent to counsel for defendants on November 29, 2010, setting forth the legal deficiencies in the first amended cross-complaint and offering 21 days to withdraw the pleading in question. The correspondence also included a copy of the proposed motion for monetary sanctions, as required by the section 128.7, subdivision (c)(1). When the pleading was not withdrawn, the motion was filed.

We move to the propriety of the trial court's award of sanctions. We review an order awarding sanctions pursuant to section 128.7 under the abuse of discretion standard. (*Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167.)

Appellants contend that the trial court abused its discretion in awarding sanctions because they are allowed to "zealously argue the point," citing *Guillemin v. Stein*, *supra*, 104 Cal.App.4th at page 168. Section 128.7 is modeled after rule 11 of the Federal Rules of Civil Procedure. In *Guillemin*, the court stated that "'[r]ule 11 must not be construed so as to conflict with the primary duty of an attorney to represent his or her client zealously. Forceful representation often requires that an attorney attempt to read a case or an agreement in an innovative though sensible way. Our law is constantly evolving, and effective representation sometimes compels attorneys to take the lead in that evolution. Rule 11 must not be turned into a bar to legal progress.'" (*Guillemin, supra*, at pp. 167-168.)

In the instant case, the trial court was not persuaded by the argument that appellants were simply zealously representing their client. It explained: "[Johnson's] counsel's argument that they were simply zealously representing their client is not well taken. There is simply no authority to support the contention that an attorney engaging in conduct that violates section 128.7[, subdivision](b) can avoid sanctions by arguing that the conduct was the result of zealous representation. Second, the fact that the [respondents'] earlier demurrer to the cross-complaint was sustained with leave to amend did not automatically give [Johnson] license to file[] an amended cross-complaint if there was no valid evidentiary or factual basis for it. As is specifically reflected by this Court's ruling on January 4, 2011, the new theory of failed consideration (as opposed to a lack of consideration) was contradicted by the clear material terms of the Rescission Agreement.

What [defendant] was really alleging was not a failure of consideration, but a subsequent remorseful insufficiency of consideration, which is also questionable. The express and unambiguous terms of the Rescission Agreement called for cancelation of the Installment Contract with no further rights or obligations between the parties."

The rescission agreement is clear and unambiguous. It provides that (1) the parties acknowledge the receipt and sufficiency of valuable consideration; (2) the Installment Agreement is rescinded, with no further rights or obligations by and between the parties; and (3) the seller and buyer release each other from all claims, debts, and obligations.

Appellants contend that they had a right to amend their cross-complaint because of the general rule that facts recited in a written instrument are conclusively presumed to be true does not apply to the recital of consideration. (*W. P. Fuller & Co. v. McClure* (1920) 48 Cal.App. 185, 193.) Even if the recital of valuable consideration was removed from the rescission agreement, paragraph 3 of the agreement is very clear. It provides: "**Mutual General Release**. Upon mutual execution and delivery of this Agreement . . . , Seller, on the one hand, and Buyer, on the other hand . . . hereby release each other . . . from any and all claims, demands, debts, losses, obligations, liabilities, costs, expenses, rights of action and causes of action, of any kind or character whatsoever . . . that arose prior to the date hereof . . . ."

As the trial court found, in the first amended cross-complaint, Johnson "failed to allege any facts showing that the consideration she was supposed to receive pursuant to the Rescission Agreement was anything other than a release of all further obligations under the Installment Contract."

W. P. Fuller & Co. v. McClure, supra, 48 Cal.App 185 is distinguishable. There, the court allowed parol evidence to resolve a dispute involving whether the moving party actually received the full amount of money recited in the agreement. (*Id*. at p. 193.) In the instant case, there is no dispute as to whether or not defendant actually received the consideration recited in the instrument, the release. As a result of the mutual release, defendant was relieved from over $4 million in debt to respondents.

Appellants also rely on *Tampico v. Wood* (1963) 222 Cal.App.2d 211 to support their argument that in a typical rescission of a property sales contract, the buyer normally gets his money back and the seller gets his property back. Since Johnson did not get her money back, appellants assert, the rescission agreement lacked consideration. The facts in *Tampico* are distinguishable from the instant case, however.

In *Tampico*, the court rescinded the sales contract and ordered the return of property because the sales contract was the product of fraudulent inducement. (*Tampico v. Wood*, *supra*, 222 Cal.App.2d at p. 214.) Return of the purchase price is a common occurrence in a case where there is an allegation of fraud in the inducement. In the instant case, the parties voluntarily agreed to a new contract, the rescission agreement. There was no judicial finding of fraud or misrepresentation that would warrant a return of property. The court, in the instant matter, could not have been clearer in its ruling and reasoning:

"The failure of consideration theory appears to have been based solely on the 'Rescission Agreement' title and the fact that, in the usual case, rescission puts parties back into the same position prior to entering into the rescinded contract. However, [Johnson's] contention that she was entitled to recover all monies paid pursuant to the Installment Contract in addition to monies she spent improving the property was materially contradicted by the language of the Rescission Agreement providing for release of [Johnson and her husband] from their obligation to pay the [respondents] the remaining $3.7 million and other sums owed, nothing else."

In sum, the first amended cross-complaint was indisputably a frivolous pleading. We find no abuse of discretion in the trial court's awarding of sanctions. (*Guillemin v. Stein*, *supra*, 104 Cal.App.4th at p. 167.)

DISPOSITION

The award of sanctions is affirmed. Respondents are awarded their costs on appeal.[4]

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.

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[4] Since we have affirmed the award of sanctions for respondents, we do not consider appellants' request for attorney's fees. In addition, we deny respondents' request that we award respondents attorney's fees for defending the appeal.