Filed 10/23/18 Lee v. Yang CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CAROLINE S. LEE, Plaintiff and Appellant, v. DAVID YANG et al., Defendants and Respondents.	B286530 (Los Angeles County Super. Ct. No. BC640912)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Deirdre H. Hill, Judge. Affirmed as to Rivas; dismissed as to Yang.

Franklin Jeffries for Plaintiff and Appellant Caroline Lee.

Law Offices of Dale J. Park and Dale J. Park for Defendants and Respondents David Yang and Christopher Rivas.

Plaintiff Caroline Lee appeals from an order sustaining without leave to amend the demurrer of David Yang and Christopher Rivas to the Racketeer Influenced and Corrupt Organization (RICO; 18 U.S.C.A., §§ 1961 et seq.) cause of action alleged in her third amended complaint. Because Lee alleged an additional cause of action (breach of fiduciary duty) against Yang, the trial court entered a judgment of dismissal as to Rivas only; Yang remains a defendant.

In her RICO claim, Lee alleges she and Yang as partners owned three Los Angeles rental properties, which Yang and Rivas represented they would manage honestly and competently, but instead they misappropriated rent proceeds, failed to make necessary repairs and allowed tenancies to become unregistered, threatening her with foreclosure and government sanctions. As a result of this extortion, she alleges, she incurred code enforcement expenses, lost rental proceeds and lost property value.

Lee contends the trial court erred in concluding she could not state a RICO cause of action on the ground she had not alleged Yang and Rivas operated an enterprise engaged in or affecting interstate commerce. (She does not identify any additional facts in support of her claim and does not request leave to amend.) Yang and Rivas argue the appeal must be dismissed as to Yang, and the trial court's order and dismissal as to Rivas were proper apart from the interstate commerce determination because Lee failed to allege predicate acts of extortion.

We agree with Yang and Rivas and therefore affirm the order and judgment of dismissal as to Rivas and dismiss the appeal as to Yang.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Allegations in the Third Amended Complaint*

The third amended complaint alleges that Yang Enterprise is an informal partnership and association consisting of Yang as chief executive and Rivas as deputy chief executive.[1] Through respondents (and Yang's alter ego shell companies Say Properties, Inc. and LND Investments, LLC), Yang Enterprise owns and manages real estate holdings of substandard properties in Los Angeles and uses the mail or other facilities in interstate commerce. Yang Enterprise also manages and services mortgage loans governed by the Federal Deposit Insurance Corporation (FDIC), making use of instruments and facilities of interstate commerce including the United States mail. To carry out extortion under the auspices of the Yang Enterprise, Yang has engaged in acts of violence against Lee, and Rivas has threatened physical violence to property.

In 2014 Yang was the "CEO Manager" of CYJY Property, LLC, and Lee was its "Member Manager." Lee contributed $284,000 toward CYJY Property's purchase of a property on Burlington Avenue for $770,000, but through Yang's deceit, Yang's shell company (Say Properties) became the actual purchaser without contributing any funds.

After CYJY Property changed its name to CY Property, LLC, CY Property contracted to remodel a property on Grand View Street and then borrowed $370,000 against Lee's separate property on Bonnie Brae. Lee also contributed $196,770 for CY Property's purchase of a property on Westlake Avenue.

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[1] We will sometimes refer to Yang and Rivas collectively as respondents.

On December 1, 2014, Yang and Rivas told Lee (orally and via wire and hardcopy mail) that they were honest and wanted to manage the Westlake, Bonnie Brae and Grand View properties, and she relied on their statements, which concealed their actual plan—to take Lee's rental monies for themselves while failing to make repairs needed to avoid substandard housing conditions and resulting government sanctions. They carried out this plan from November 1, 2014 through February 5, 2016.

As property managers, respondents collected monthly rents of $5,000 to $6,000 for each property but misrepresented the amounts collected and concealed the amounts they took for themselves without Lee's consent, while allowing the properties to fall into disrepair. When Lee asked about the money, Yang falsified CY Property accounts and financial reports so respondents' taking would go undetected.

In their capacities as property managers receiving rent monies belonging to Lee, respondents "threatened [Lee] with conversion of legitimate rental housing at [the] Westlake and Bonnie Brae [p]roperties into 'code violation' housing and unregistered rental units and consequent government sanctions, and thus foreclosure of said properties because rent payments would never reach the landlord and thus payment would be unavailable for the mortgage note."

Respondents carried out these threats by converting legitimate rental housing into "code violation" housing, "posing real risk of foreclosure." As a result of respondents' "acts of extortion," Lee incurred code enforcement expenses of about $100,000; loss of rental proceeds of about $300,000; and loss in property values totaling about $2 million, and in conducting Yang Enterprise by means of extortion, a pattern of racketeering

activity, respondents caused economic losses exceeding $2.3 million. Lee has never alleged that she actually lost any of her properties to respondents or anyone else as a result of respondents' alleged actions.

Based on these allegations, Lee asserts a civil RICO claim against both Rivas and Yang.[2]

2. *Prior Pleadings and Trial Court Proceedings*

2.1. The Complaint

In her original complaint, based on a similar version of these allegations, Lee asserted five causes of action: fraud, extortion, breach of fiduciary duty, constructive fraudulent conveyance (Civ. Code, § 3439), and fraudulent business act or practice (Bus. & Prof. Code, § 17200).[3] In their demurrer, respondents argued that Lee had failed to allege fraud with specificity, the extortion claim was not recognized under California law, and that it was duplicative of the fraud claim in any event. In her opposition, Lee argued that her fraud cause of action was based on federal law, and that both federal and California law supported her extortion claim. In the order sustaining the demurrer to the fraud and extortion causes of

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[2] She alleges a second cause of action for breach of fiduciary duty against Yang alone, but this claim is not at issue in this appeal.

[3] Lee alleged a breach of fiduciary duty cause of action against Yang only in each version of her complaint. Because this cause of action is not involved in this appeal, we address it only as relevant to the dismissal of Lee's appeal with respect to Yang.

Similarly, because the fourth (constructive fraudulent conveyance) and fifth (fraudulent business practice) causes of action are not at issue in this appeal, we address them only as relevant.

action with leave to amend, the trial court noted ambiguity between Lee's complaint and the legal theories advanced in her opposition and directed her to "clarify specifically what claim Plaintiff is asserting" in each cause of action.

2.2. The First Amended Complaint

In her first amended complaint, Lee identified her first and second causes of action as "civil RICO fraud" (18 U.S.C. §§ 1343, 1964(c)) and "civil RICO extortion" (18 U.S.C. §§ 1951, 1964(c)) respectively. Respondents argued that Lee's amended complaint made no substantive change other than to add "RICO" to the first and second causes of action. They argued the cited criminal statutes applied to criminal proceedings, the trial court lacked jurisdiction to rule upon these federal claims, Lee had not alleged activities affecting interstate commerce, and she had failed to allege the elements of either cause of action.

In her opposition, Lee argued that: she had amended her complaint as directed in the court's prior order; respondents were not entitled to a "second bite at the apple"; the court had jurisdiction because the Los Angeles Superior Court cover sheets refer to civil RICO; mail fraud is a statutory claim and not a common law claim; and mail fraud was adequately alleged. Without any mention of her own allegations, Lee also quoted a summary of the elements of extortion with citations to case law (https://www.justice.gov/usam/criminal-resource-manual-2403).[4]

[4] Lee also asked the trial court to take judicial notice of the complaint and tentative ruling overruling a demurer in another case involving the same defendants, the same defense counsel and substantially identical RICO claims of another plaintiff (except that the other plaintiff alleged Yang had physically

The trial court sustained the demurrer to the RICO mail fraud cause of action without leave to amend on the ground no private right of action was permitted. The court sustained the demurrer to the RICO extortion claim for failure to allege an effect on interstate commerce, granting Lee leave to amend in order to remedy this deficiency. The trial court further stated this would be Lee's final opportunity to amend, and no new causes of action could be added without leave of court.

2.3. The Second Amended Complaint

Lee added allegations that in addition to managing and servicing mortgage loans regulated by the FDIC, Yang Enterprise affected interstate commerce through its ownership and operation of multi-million dollar real estate holdings and proximately caused Lee's losses exceeding $1 million. In their demurrer, respondents argued the new allegations were insufficient because the properties identified in the complaint were all located in California, and even if a criminal statute (18 U.S.C. § 1951 [defining extortion]) could apply, Lee had failed to allege a RICO cause of action in any event.

In her opposition, Lee argued that the focus in all RICO cases is not on "criminal versus civil" but rather on predicate acts which the defendants had not addressed.[5] She further argued that under federal law, RICO activity could occur within the state, and a nexus with interstate commerce exists where one is able to commit predicate acts by virtue of his or her involvement

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assaulted and battered her). The trial court ordered Lee to file a notice of related cases in this regard, and she did so.

[5] Lee also asserted that other states were involved.

in the enterprise or if the predicate offenses were related to the activities of the enterprise.

Without addressing the interstate commerce issue respondents had raised, the trial court sustained the demurrer to the RICO extortion cause of action on the ground Lee had failed to allege a predicate act: In alleging respondents "'were able to threaten her with foreclosure and consequent government sanctions' and 'carried out their threats,'" the trial court found that it was unclear how such threats came about or how respondents would have the ability to foreclose on the properties or cause sanctions to be imposed.

3. *The Demurrer to the Operative Third Amended Complaint*

In her third amended complaint, Lee added allegations regarding Yang Enterprise's use of instruments and facilities of interstate commerce in sending and receiving documents for mortgage loans and trust deeds through the mail.[6] Citing additional federal case law, Lee further stated that "RICO plaintiffs are not required to show more than minimal effect on interstate commerce . . . ."

In their demurrer, respondents argued there was no meaningful difference between the most recent version of Lee's RICO extortion claim and any prior iteration, and although the trial court had sustained prior demurrers on the same ground with leave to amend, Lee had failed once again to allege racketeering activity affecting interstate commerce. Because the properties were located in California, and the activities Lee

[6] She also included new allegations regarding Yang and his alter ego shell companies which appear to relate to the breach of fiduciary duty cause of action.

described all took place within the state, Lee's assertion of legal conclusions could not overcome this deficiency.

Again without any discussion or explanation of how her allegations supported a RICO extortion claim, Lee presented the same summary of case law she had submitted in opposition to respondents' demurrer to her first amended complaint, asserting respondents were not permitted to repeat arguments already presented.

In its September 27, 2017 order, the trial court sustained the defendants' demurrer to the RICO extortion claim without leave to amend. The trial court found that respondents were entitled to challenge Lee's amended pleading on the ground Lee had failed to allege interstate activity because the trial court had sustained their prior demurrers on this ground, and concluded that Lee had failed to remedy this deficiency. In addition, the court noted that it had sustained the demurrer to the second amended complaint on the ground that Lee had failed to allege predicate acts and had therefore failed to allege racketeering activity. However, because neither the demurrer to the third amended complaint nor the opposition discussed the issue, the trial court limited its discussion to the issue of interstate activity.

On November 27, 2017, Lee filed a notice of appeal from the September 27, 2017 order sustaining the defendants' demurrer to the first (RICO extortion) cause of action of the third amended complaint, even though the trial court had not yet entered judgment.

On January 29, 2018, the trial court entered a judgment of dismissal as to Rivas, noting the unchallenged breach of fiduciary duty cause of action against Yang remained, and that Yang had answered Lee's third amended complaint.

DISCUSSION

1. *Appealability*

As a preliminary matter, we note that Lee prematurely filed her notice of appeal on November 27, 2017, following the trial court's order sustaining the demurrer to the third amended complaint without leave to amend before the judgment of dismissal was then entered in favor of Rivas. (See *Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1013, 1019 [orders sustaining demurrers are not appealable].) As we noted in *Boyer v. Jensen* (2005) 129 Cal.App.4th 62, 69, we have discretion to entertain a premature appeal as long as judgment was actually entered, there is no doubt concerning which ruling the appellant presents for review, and the respondents were not misled to their prejudice. As there is no indication Rivas was misled or prejudiced by Lee's premature notice, we exercise our discretion in favor of hearing the matter on the merits as to Rivas.

As to Yang, however, there is no judgment of dismissal because Yang did not challenge the second cause of action for breach of fiduciary duty alleged against him, and he has answered Lee's third amended complaint. Under these circumstances, Yang argues, the appeal as to him should be dismissed because there is no final judgment as to him. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695.) We agree. We therefore dismiss the appeal as to Yang.

2. *Standard of Review*

"'The rules by which the sufficiency of a complaint is tested against a general demurrer are well settled. We not only treat the demurrer as admitting all material facts properly pleaded, but also "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. . . ." [Citation.] [¶] If

the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer. "[W]e are not limited to plaintiff['s] theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the *factual* allegations of the complaint are adequate to state a cause of action under any legal theory. . . ." [Citations.]' [Citation.]" (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370.)

"We review the trial court's denial of leave to amend for an abuse of discretion. [Citation.]" (*Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209, 1223; see also *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100.) The question before us is "'whether there is a reasonable probability that the defect can be cured by amendment. [Citation.]' [Citation.]" (*Rea*, *supra*, at p. 1223; accord, *Loeffler*, *supra*, at p. 1100.) "A court's sustaining a demurrer without leave to amend is appropriate when, based on ""the nature of the [complaint's] defects and [the plaintiff's] previous unsuccessful attempts to plead,"" it is improbable the plaintiff can state a cause of action. [Citation.]" (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 534, disapproved on another ground in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939, fn. 13; accord, *Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 724.) The plaintiff has the burden of showing """in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." [Citation.]'" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491; accord, *AREI II Cases* (2013) 216 Cal.App.4th 1004, 1020.)

3. *General RICO Authority*

RICO, codified at title 18 United States Code[7] sections 1961 to 1968, "is aimed at 'racketeering activity'" and "creates a private cause of action for treble damages by providing [that] '[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.' (18 U.S.C. § 1964(c).)"[8] (*Gervase v. Superior Court* (1995) 31 Cal.App.4th 1218, 1228 (*Gervase*).)

Section 1962(c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." For conduct to constitute "racketeering activity," it must be included in the list of state and federal crimes set forth in section 1961(1). (*Gervase*, *supra*, 31 Cal.App.4th at p. 1232.)

Lee alleges that respondents' conduct constituted extortion under the Hobbs Act (§ 1951(b)(2)), which is included in the list of "racketeering activity" found in section 1961(1). "Extortion" means "the obtaining of property from another, with his [or her] consent, induced by wrongful use of actual or threatened force, violence, or fear . . . ." (§ 1951(b)(2).) "A plaintiff's burden is high when pleading RICO allegations as '[c]ourts look with particular scrutiny at claims for a civil RICO, given RICO's damaging

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[7] All undesignated section references are to title 18 of the United States Code.

[8] State courts have concurrent jurisdiction over RICO claims. (*Cianci v. Superior Court* (1985) 40 Cal.3d 903, 908.)

effects on the reputations of individuals alleged to be engaged in RICO enterprises and conspiracies.' [Citations.]" (*Mackin v. Auberger* (W.D.N.Y. 2014) 59 F. Supp. 3d 528, 541.) "'[C]ourts should strive to flush out frivolous RICO allegations at an early stage of the litigation.' [Citation.]" (*Pratap v. Wells Fargo Bank*, N.A. (N.D.Cal. 2014) 63 F. Supp. 3d 1101, 1114.)

Lee contends the only issue on appeal is whether Yang Enterprise engaged in, or its activities affect, interstate commerce. However, Rivas argues the trial court properly sustained his demurrer to Lee's civil RICO claim because she failed to allege: (1) acts affecting interstate commerce, (2) the predicate act(s) of extortion, and (3) the existence of an enterprise. In her reply brief, Lee notes the discussion of "a lot of topics" in the respondents' brief, but she fails to respond to them, asserting without citation to any authority that interstate activity is the "one . . . and only" issue. She is mistaken. "If a proper ground exists for sustaining the demurrer, we affirm 'even if the trial court relied on an improper ground, whether or not the defendants asserted the proper ground in the trial court.' (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 880, fn. 10 . . . .)" (*Fonteno v. Wells Fargo Bank, N.A.* (2014) 228 Cal.App.4th 1358, 1365.)

4. *The Interstate Commerce Issue*

Lee contends that an apartment building used as rental property is "per se interstate commerce" under *United States v. Mahon* (9th Cir. 2015) 804 F.3d 946 (*Mahon*). She therefore contends that she has satisfied the interstate commerce requirement because she alleges Yang Enterprise's ownership and management of apartment buildings used as rental

properties. Rivas argues that *Mahon* is distinguishable because it is an arson case, not a RICO case.

Mahon involved convictions under sections 844(i) and (n), which require proof the defendant, by means of an explosive, has maliciously damaged or destroyed any property "'used in interstate . . . commerce or in any activity affecting interstate . . . commerce.'" (*Mahon*, *supra*, at p. 950.) The *Mahon* court noted that a building may "qualify per se" under section 844(i)'s jurisdiction requirement if it is "inherently commercial" (*Mahon*, *supra*, at p. 951), and an apartment building used as rental property is "inherently commercial." (*Ibid.*, citing *Russell v. United States* (1985) 471 U.S. 858, 862; see also *United States v. Gomez* (9th Cir. 1996) 87 F.3d. 1093, 1096 [interstate commerce requirement of § 844(i) satisfied where building destroyed was used as rental property; "business property 'per se substantially affects interstate commerce'"].)

While it is therefore arguable that respondents' enterprise affected interstate commerce, as set forth below, we need not reach this issue because we can affirm on another ground.

5. *Lee Failed To Allege Any Predicate Acts of Extortion*.

To state a civil RICO claim, the plaintiff must allege a pattern of racketeering activity consisting of at least two related predicate acts amounting to or posing a threat of continuing criminal activity. (*H.J., Inc. v. Northwestern Bell Telephone Co.* (1989) 492 U.S. 229, 238–239.) Two isolated acts of racketeering activity do not constitute a pattern. (*Sedima v. Imrex Co., Inc.* (1985) 473 U.S. 479, 496, fn. 14.) Lee alleges extortion as the "racketeering activity" supporting her claim. (§ 1951(b)(2) [defining extortion as "the obtaining of property from another, with his [or her] consent, induced by wrongful use of actual or

threatened force, violence, or fear . . . ."].) However, she "can only recover to the extent [s]he has been injured in [her] business or property" by the alleged pattern of racketeering activity. (*Sedima*, *supra*, at p. 496.)

In paragraphs 4 and 5 of her third amended complaint, Lee alleges that "Yang has engaged in acts of violence" against her, and "Rivas has threatened physical violence to property." However, she does not allege that respondents obtained her real properties with her consent because of actual or threatened violence as required to allege extortion. To the contrary, she alleges that both respondents obtained her property (rent proceeds) without her consent by concealing the amounts they collected. Moreover, Lee alleges that respondents took her money for themselves instead of using it to pay for necessary repairs, and as a result, she had to pay the City of Los Angeles, not the respondents, for code violations.

The trial court sustained respondents' demurrer to the second amended complaint for failure to allege predicate acts of racketeering activity, and Lee failed to correct this deficiency. "[A] demurrer that is sustained on an erroneous ground will nevertheless be upheld on appeal if as a matter of law the complaint fails to state a cause of action. This is a variation of the rule that the appellate court reviews the trial court's *decision*, not its rationale." (*Fox v. JAMDAT Mobile, Inc.* (2010) 185 Cal.App.4th 1068, 1079.) Because Lee has failed to present argument or authority on this issue in her appellate briefing, she has forfeited it. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

6. *The Trial Court Did Not Abuse Its Discretion in Sustaining Rivas's Demurrer Without Leave To Amend.*

In its written rulings and orders on the successive demurrers, the trial court repeatedly stated that Lee's case involves "misappropriation and fraud by partners of a property management business," but rather than attempting to reframe her causes of action in this manner, she indicated her intention was to state civil RICO claims, not common law claims. She has not requested leave to amend or described how she might do so in her appellate briefing. We find no error in the trial court's order sustaining Rivas's demurrer to the RICO extortion claim without leave to amend. (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 655 ["[i]t is the appellant's burden to demonstrate the existence of prejudicial error"].)

DISPOSITION

As to Rivas, the judgment is affirmed. As to Yang, the appeal is dismissed. The parties shall bear their own costs.

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MICON, J.*

We concur:

MANELLA, P. J.

WILLHITE, J.

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