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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

ZACADIA FINANCIAL LIMITED PARTNERSHIP, Plaintiff and Appellant, v. FIDUCIARY TRUST INTERNATIONAL OF CALIFORNIA, Defendant and Respondent.	B271520 (c/w B277833) (Los Angeles County Super. Ct. No. BC539034)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ernest M. Hiroshige, Judge. Affirmed.

Law Office of Herb Fox and Herb Fox for Plaintiff and Appellant.

Richard D. Cleary; Winston & Strawn, Rolf S. Woolner, Jeff Wilkerson, and Linda T. Coberly, for Defendant and Respondent.

Plaintiff and appellant Zacadia Financial Limited Partnership (Zacadia) challenges a judgment entered in favor of defendant and respondent Fiduciary Trust International of California (Fiduciary Trust) following trial court orders sustaining Fiduciary Trust's demurrer to causes of action set forth in Zacadia's first amended complaint (FAC) and second amended complaint (SAC) without leave to amend.

We affirm.

FACTUAL[1] AND PROCEDURAL BACKGROUND

Hughes Family Estate and Graegin Loan; Zacadia's First Lawsuit Against Fiduciary Trust

"Mark Hughes, founder of Herbalife, died in 2000. . . . When [he] died . . . , most of his nearly $400 million estate was held by the Hughes Family trust, which in turn consisted of ownership of various limited liability companies, the most important of which was the Hughes Investment Partnership. The estate faced death duties of slightly more than $212 million, all immediately due, but it was able to finesse those

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[1] As set forth below, this is not Zacadia's first lawsuit against Fiduciary Trust. We adopt the facts as set forth in the prior opinion rendered by the Court of Appeal, Fourth Appellate District, Division Three. (*Zacadia Financial Limited Partnership v. Fiduciary Trust International of California* (Jan. 8, 2014, G047613) [nonpub. opn.] (*Zacadia I*).)

taxes down to about $50 million by the device of a '*Graegin*' loan (after *Estate of Graegin v. C.I.R.* (1988) T.C. Memo 1988-477, 56 T.C.M. (CCH) 387, 1988 WL 98850.) The appeal of a *Graegin* loan is that an estate borrows money *today*, to pay its estate taxes *today*, and gets to deduct on its estate tax return *today* all the accumulated interest on the loan it will pay *tomorrow*." (*Zacadia I*, *supra*, G047613 [nonpub. opn.], at pp. *1–*2.)

"As might be gathered from that description, there is no question the *Graegin* loan in this case was a really good deal for the Hughes estate. In specific terms, the main arm of the estate, the Hughes Family Trust, borrowed $50 million in 2002 to pay the estate taxes, but since the loan would not be due until 2027, the estate got to deduct in 2002 all the interest that would accrue from 2002 to 2027, about $300 million worth. With such a large deduction taken all at once, the ostensible size of the Hughes estate shrank from something like $400 million to a mere $100 million and change, and the estate only had to pay about $50 million in estate tax.

"So where did the $50 million come from? It was part of a circle beginning in one pocket of the Hughes estate and ending up in another pocket. The Hughes Investment Partnership lent [Zacadia] $50 million at 8.60 percent interest for 25 years—Zacadia had no assets of its own and in fact was created for the sole purpose of taking money from the right hand of the estate

and transferring to the left hand—and then Zacadia turned around and lent the Hughes Family Trust the same $50 million at 8.75 percent interest, with both loans being simultaneously due in 2027. The benefit to Zacadia from the transaction is that it would turn a nifty $12 million profit. The catch was that it would have to wait 25 years for that profit.

"Somewhere between 2006 and 2008, however, Zacadia decided it wanted its money *immediately*." (*Zacadia I*, *supra*, G047613 [nonpub. opn.], at p. *5.) Thus, in August 2008, Zacadia filed suit against Fiduciary Trust, the trustee of the Hughes Family Trust, seeking "a court's imprimatur on the accelerated payment of the *Graegin* loan, such that all of it—including interest that was yet to be accumulated—was immediately due." (*Zacadia I*, *supra*, G047613 [nonpub. opn.], at p. *20.) Zacadia's theory was that Fiduciary Trust committed four breaches that entitled it to immediate acceleration of the loan. (*Id*. at p. *21.)

The case proceeded to trial in 2012, "and while the jury found the four alleged breaches were indeed breaches, it also determined that none of them was 'material,' therefore there should be no acceleration of the loan." (*Zacadia I*, *supra*, G047613 [nonpub. opn.], at pp. *5–*6.) In other words, "Zacadia was sent away empty-handed to await its 2027 payday." (*Id*. at p. *6.)

Zacadia appealed, and on January 8, 2014, the Fourth Appellate District affirmed the judgment. (*Zacadia I*, *supra*, G047613 [nonpub. opn.], at p. *44.) In a companion case, the same court affirmed an order that Zacadia pay $2.5 million in attorney fees. (*Ibid.*)

Zacadia's Instant Lawsuit Against Fiduciary Trust

On March 11, 2014, Zacadia filed the instant lawsuit, alleging the same breaches previously litigated as well as new alleged breaches. It sought both acceleration and nonacceleration damages. Fiduciary Trust demurred, and the trial court sustained the demurrer in part and overruled it in part, directing Zacadia to file an FAC.

Zacadia filed an FAC on January 23, 2015. The FAC contains eight causes of action: one for declaratory/injunctive relief and seven for breach of contract. Fiduciary Trust again demurred. The trial court sustained the demurrer without leave to amend as to four of the causes of action based upon breach of contract and overruled it as to the declaratory/injunctive relief claim and the remaining breach of contract claims.

In accordance with the trial court's instructions, on September 4, 2015, Zacadia filed the SAC, the operative pleading. The SAC alleges seven causes of action: one for declaratory/injunctive relief (seeking an injunction precluding Fiduciary Trust from exercising certain voting rights) and six for

various breaches of the trust loan documents. The breaches allegedly occurred both *before* and *after* the filing of the complaint in the prior litigation.

Fiduciary Trust's Petition for Escrow of Funds Due Zacadia in 2027

Meanwhile, Fiduciary Trust sought an alternate way to stave off Zacadia's claims—on August 6, 2015, it filed a petition for order approving escrow of treasury securities. Fiduciary Trust alleged that Zacadia "has for 10 years been making bad faith demands and threats on the trustees of the Mark Hughes Family Trust, and has brought meritless litigation against the Trust. Zacadia's first unsuccessful action against the Trust resulted in judgments in favor of the Trust against Zacadia for nearly $3,000,000 in legal fees and costs, none of which Zacadia has paid. Those judgments did not stop Zacadia from suing the Trust again based on the same claims and theories, or from interfering with entities owned by the Trust. [Fiduciary Trust] files this Petition to bring to an end Zacadia's continuing harassment and interference with the administration of the Mark Hughes Family Trust, and for a judicial determination that Zacadia has no interest in any property of the Trust (other than the escrowed securities described below), and is not entitled to information about the Trust or its property." Fiduciary Trust sought leave to create an escrow account funded with assets with

a present value in excess of the amount of Zacadia's 2027 profit, less the amount Zacadia will owe the Trust in 2027 as a result of the fee awards in the prior litigation.

The probate court issued an order approving the escrow instructions and related arrangements described in Fiduciary Trust's petition. The escrow instructions were signed on November 30, 2015, and the escrow account was fully funded by December 18, 2015.

Demurrer to SAC

While the proceedings were pending in the probate court, Fiduciary Trust filed a demurrer to the SAC. It argued, inter alia, that Zacadia's claims were barred by the doctrines of res judicata and collateral estoppel and that, in any event, Zacadia could not allege damage in light of the newly-established escrow account that guaranteed Zacadia's payment in 2027.

Zacadia opposed the demurrer.

After entertaining oral argument, the trial court sustained Fiduciary Trust's demurrer without leave to amend. It took judicial notice of the filings and rulings made in the probate court and "agree[d] with the Probate Court that the securities deposited into escrow [were] adequate security for the payment [Zacadia] is entitled to receive on December 31, 2027. In light of the escrow instructions, the [trial court found] that [Zacadia was] unable to allege damages." In so ruling, the trial court rejected

Zacadia's contention that it could end up owing $350 million; as noted in *Zacadia I*, *supra*, G047613 [nonpub. opn.], at page *4, Zacadia's exposure is limited to $12 million. The trial court summarized: "[I]n light of the escrow instructions, [Zacadia] can no longer allege even *some* damages. [Zacadia] no longer needs to take steps to protect its probability of payment or protect its security interest because [Zacadia's] payment is now *guaranteed* in 2027."

Judgment was entered on March 24, 2016.

Later, the trial court awarded Fiduciary Trust $508,066 in attorney fees.

Appeal

Zacadia timely appealed the judgment and the order awarding Fiduciary Trust attorney fees.

DISCUSSION

I. *Standard of review*

"Our Supreme Court has set forth the standard of review for ruling on a demurrer dismissal as follows: 'On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law.

[Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]' [Citations.]" (*Payne v. National Collection Systems, Inc.* (2001) 91 Cal.App.4th 1037, 1043–1044.)

II. *The trial court's judgment is affirmed*

While the appellate briefs are confusing and the appellate record is lengthy, the issue presented on appeal is quite simple: Can Zacadia plead damages? The answer is no. As the trial court determined, based upon the escrow instructions approved by the probate court, Zacadia's payment in 2027 is guaranteed by a fully funded escrow account.

Zacadia challenges the trial court's finding on the grounds that it erroneously assumed that Zacadia was only entitled to a $12 million profit. But the trial court did not make any faulty assumptions. Rather, it based that determination upon the Court of Appeal's decision in *Zacadia I*. (*Zacadia I*, *supra*, G047613 [nonpub. opn.], at p. *5 [Zacadia's benefit from the *Graegin* loan was "a nifty $12 million profit"], *40–*41 ["Under

Zacadia's theory, in return for being a mere conduit in a scheme to avoid taxes, Zacadia would walk off with *far more* than the tidy $12 million profit in 2027 it bargained for"].) And, Zacadia's challenge to its entitlement to only $12 million is barred by the doctrine of collateral estoppel.

Collateral estoppel "'precludes relitigation of issues argued and decided in prior proceedings.'" (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511 (*Hernandez*).) The doctrine applies if five elements are met: (1) the issue sought to be precluded from relitigation is identical to that decided in a former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the issue was necessarily decided in the former proceeding; (4) the decision in the former proceeding was final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (*Ibid.*)

"For purposes of collateral estoppel, an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding. [Citation.]" (*Hernandez*, *supra*, 46 Cal.4th at p. 511.)

Zacadia's objection notwithstanding, the issue of its entitlement to anything more than $12 million was actually litigated in *Zacadia I*. In *Zacadia I*, the Court of Appeal considered Zacadia's objection to jury instructions given in that

underlying trial. (*Zacadia I*, *supra*, G047613 [nonpub. opn.], at p. *6 ["The big legal issue in this case centers on the trial court's instruction to the jury that a breach would have to be 'material' to justify *acceleration* of the loan"].) In evaluating that legal argument, the Court of Appeal necessarily interpreted the structure of the loan and Zacadia's "net $12 million interest rate spread." (*Id.* at p. *13.) It follows that the Court of Appeal rejected Zacadia's assertion that its maximum exposure is $343 million, not its anticipated $12 million profit—an assertion Zacadia repeats here.

Zacadia further argues that Fiduciary Trust is judicially estopped from relying upon the probate court order because Fiduciary Trust's counsel agreed that the probate court order would not have collateral estoppel effect on this litigation. Zacadia conflates the issues presented. The trial court here did not determine that the probate court order has collateral estoppel effect on this litigation. All the trial court did was find that the deposit into escrow of adequate funds to pay Zacadia in 2027 precludes its claim of damages in this case.

Our analysis could stop here.

For the sake of completeness (and in hopes of preventing future litigation), we address Zacadia's other arguments:

Zacadia argues that the trial court erroneously sustained demurrers to the acceleration causes of action in both the FAC

and SAC. To the extent its claims are based upon breaches that were litigated in the prior proceeding, Zacadia asserts that those claims are not barred because of the "aggregate effect" of the breaches. In so arguing Zacadia ignores the well-established principle of res judicata. Res judicata prohibits the relitigation of claims and issues in an earlier proceeding. In other words, it bars "relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.)

In the prior proceeding, the parties litigated the issue of alleged breaches and Zacadia's demand for acceleration. While the jury found that there had been breaches, it also found that those breaches were not material. Zacadia offers us no reason to revisit this issue. The federal cases cited by Zacadia (*SunTrust Mortgage Inc. v. United Guaranty Residential Insurance Co. of North Carolina* (E.D.Va. 2011) 806 F.Supp.2d 872, 902; *U.S. Bank, N.A. v. UBS Real Estate Sec. Inc.* (S.D.N.Y. 2016) 205 F.Supp.3d 386; *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.* (2d. Cir. 2007) 500 F.3d 171, 187; and *Talley v. Talley* (S.D. 1997) 566 N.W.2d 846 and the one law review article (Porat & Posner, *Aggregation and Law* (2012) 122 Yale L.J. 2, 30–33), are readily distinguishable as they did not involve a second legal proceeding and did not address res judicata.

As for Zacadia's allegations of breaches that occurred after the prior proceeding was litigated, the demurrer was rightly sustained for the simple reason that Zacadia cannot allege damages. Any monies to which it is entitled in 2027 are protected in an escrow account.

It follows that we reject Zacadia's contention that it should be allowed to allege previously litigated breaches to prove that the later breaches were willful.

Zacadia next urges that the absence of actual damages does not foreclose moving forward to obtain nominal damages. However, the grant of a demurrer will not be overturned for the failure to award nominal damages. (*Kenyon v. Western Union Tel. Co.* (1893) 100 Cal. 454, 458–459.)

Finally, Zacadia contends that the trial court erroneously sustained Fiduciary Trust's demurrer to its request for injunctive relief. Specifically, in the SAC, Zacadia sought an injunction precluding Fiduciary Trust from exercising its voting rights.

A permanent injunction is an "equitable remedy for certain torts or wrongful acts of a defendant where a damage remedy is inadequate." (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 646.) Declaratory relief cannot be awarded if the plaintiff can otherwise sue for damages. (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 909–910.)

As set forth in Fiduciary Trust's respondent's brief, Zacadia is not entitled to an injunction because, if anything, it would have a claim for monetary damages. If Fiduciary Trust commits any malfeasance, Zacadia is entitled to the monies that have been set aside in the escrow account. And if somehow Fiduciary Trust does not pay the monies owed in 2027, Zacadia has not alleged or argued that it would not be allowed to sue Fiduciary Trust at that time.

III. *Attorney fees*

Zacadia's sole argument regarding the award of attorney fees is as follows: Because the Court of Appeal should reverse the judgment, the award of attorney fees and costs must be reversed as well. For the reasons set forth above, we affirm the judgment in favor of Fiduciary Trust. It follows that we affirm the award of attorney fees.

DISPOSITION

The judgment is affirmed. Fiduciary Trust is entitled to costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT