Filed 10/17/13 Kambon v. T-Mobile USA CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

AKINSANYA KAMBON et al., Plaintiffs and Appellants, v. T-MOBILE USA, INC., Defendant and Respondent.	B246058 (Los Angeles County Super. Ct. No. NC057653)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph E. DiLoreto, Judge. Affirmed.

Charles Sutton for Plaintiffs and Appellants.

Willenken Wilson Loh & Delgado, Paul J. Loh and Carlos A. Singer, for Defendant and Respondent.

I. INTRODUCTION

Plaintiffs, Akinsanya Kambon, Tama-sha Kambon, The Gallery Kambon and Pan African Art, appeal from a demurrer dismissal. The trial court sustained the demurrer to the fourth cause of action of defendant, T-Mobile USA, Inc. without leave to amend. Plaintiffs argue: it was error to sustain the demurrer because they stated valid causes of action for negligent misrepresentation and negligence; defendant's statements were not mere opinions about the future because they concern technical matters within its expertise; and the trial court abused its discretion in denying their request for leave to amend the complaint. We affirm the judgment of dismissal.

II. BACKGROUND

A. Complaint

On May 24, 2012, plaintiffs filed a complaint against: R.W.S & P, Inc. doing business as Royal Roofing Company; Reginald Wills; Steven Elliot Pinkus; defendant; American Integrated Resources, Inc.; and American Contractors Indemnity Company, as surety for Royal Roofing Company. The Kambons are a married couple. They own The Gallery Kambon, a for-profit business, and Pan African Art, a non-profit entity. Mr. Kambon is an artist who creates original paintings, drawings, pottery and sculptures. Ms. Kambon manages her husband's artwork and serves as executive director of the gallery. They own a building located in Long Beach, which is used as a residence, a gallery and a community center.

In March 2009, defendant's representatives, Dominique Garcia and Micah Sullivan, contacted the Kambons. They sought permission to install cellular transmission towers on the roof of plaintiffs' building. To ensure the structure could support the cellular transmission towers, defendant with plaintiffs' consent, contacted Royal Roofing Company to arrange for a roof inspection. The complaint alleges: "On April 10, 2010,

[defendant] contracted with Royal Roofing to conduct further inspection and make saw cuts that allowed samples of the roof to be made to determine suitability for [defendant's] towers. [Defendant] also advised [plaintiffs] that Royal Roofing should be hired to do any work required to make the roof suitable for installation of the towers."

On September 22, 2010, Mr. Wills from Royal Roofing Company contacted plaintiffs to arrange the roof inspection. An inspector discovered asbestos during the roof inspection. Mr. Wills and defendant recommended plaintiffs use American Integrated Resources, Inc. for asbestos abatement. On September 16, 2010, Tim Christopoulos, the project manager for American Integrated Resources, Inc., submitted an asbestos abatement estimate to Bill Schick of Royal Roofing Company. On September 23, 2010, Mr. Wills provided plaintiffs with a contract for roof repair and re-roofing of plaintiffs' building. The contract stated the asbestos removal cost was $1,200. The re-roofing and roof repair were an additional $17,000. On September 24, 2010, American Integrated Resources, Inc. sent defendant an invoice of $1,200 for asbestos removal. Plaintiffs signed the Royal Roofing Company contract on October 4, 2010.

On October 4, 2010, Mr. Wills and Mr. Pinkus from Royal Roofing Company advised plaintiffs roofing could not commence that day because of a rainstorm forecast. Plaintiffs asked Mr. Wills whether a water leak would damage the building's interior. Mr. Wills allegedly assured plaintiffs the building's exterior roof would be protected and its interior would be fine.

Early on the morning of October 6, 2010, the interior roof collapsed during the rainstorm. Rainwater and debris poured through the roof and destroyed Mr. Kambon's original artwork. In addition, rainwater and debris damaged furniture, fixtures and the gallery's interior ceiling, walls and floor. At 1:39 a.m. that day, plaintiffs contacted Royal Roofing Company to complain about the damage. At 7:30 a.m., a crew from Royal Roofing Company arrived at the building to stop the water leak and photograph the damaged interior. Over the phone, Mr. Wills on behalf of Royal Roofing Company denied liability for the damaged interior. In January 2011, Royal Roofing Company completed exterior re-roofing and roof repair of the building. But Royal Roofing

Company refused to repair the interior damage despite plaintiffs' request. In addition, the building roof continued to leak.

Plaintiffs allege negligence, negligent misrepresentation and negligent emotional distress infliction causes of action against Royal Roofing Company, Mr. Wills, and Mr. Pinkus. Plaintiffs also allege a claim for recovery on a licensed bond against American Contractors Indemnity Company as surety for Royal Roofing Company. In addition, plaintiffs allege a negligence cause of action against American Integrated Resources, Inc. for failing to ensure the roof was properly sealed after asbestos removal. Finally, plaintiffs allege a claim for negligent misrepresentation against defendant in their fourth cause of action. It is this cause of action that is the subject of the present appeal.

Plaintiffs allege defendant contacted Royal Roofing Company and recommended the roofer to them for roof inspection and repair in connection with the installation of the cellular transmission towers. Also, defendant and Royal Roofing Company recommended American Integrated Resources, Inc. for asbestos removal. The complaint alleges, "[Defendant] represented to [plaintiffs] that [Royal Roofing Company, Mr. Wills and Mr. Pincus] would 'coordinate and handle all aspects of roof preparation and installation of the . . . cellular transmission towers, and they will do an excellent job."' Plaintiffs allege the representation was made to induce their agreement to the installation of cellular transmission towers on their building. And the complaint alleges, "[Defendant] had no reasonable grounds for believing the representation was true when made because [Defendant] knew or should have known that [Royal Roofing Company was] in the business of re-roofing and roof repair—not the business of asbestos removal." Defendant knew this because it received an invoice for asbestos removal directly from American Integrated Resources, Inc. According to the complaint: plaintiffs reasonably relied upon defendant's representations; they had good reason to believe defendant would recommend a roofing professional capable of making the roof suitable for installation of cellular transmission towers; in reliance on defendant's representations, plaintiffs hired Royal Roofing Company for roof repair; defendant permitted American Integrated Resources, Inc. access to the roof for asbestos removal; plaintiffs relied on and expected

professional communication between American Integrated Resources, Inc. and Royal Roofing Company "to assure quality, performance, and completion of work"; and plaintiffs reliance on defendant's statements was a substantial factor in causing their harm.

B. Defendant's Demurrer

On September 13, 2012, defendant demurred to the complaint's fourth cause of action for negligent misrepresentation. Defendant argued plaintiffs failed to state facts sufficient to constitute a cause of action against it. On October 10, 2012, plaintiffs filed their opposition to the demurrer. Plaintiffs also requested leave to amend the complaint. No transcript or settled statement of the November 2, 2012 hearing has been provided. On November 2, 2012, the trial court sustained the demurrer without leave to amend. Plaintiffs filed their notice of appeal on December 20, 2012.

III. DISCUSSION

A. Standard Of Review

On appeal from an order sustaining demurrer, we assume all the facts alleged in the complaint are true. (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998; *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) In addition, we consider judicially noticed matters. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Evans v. City of Berkeley, supra,* 38 Cal.4th at p. 6.) We accept all properly pleaded material facts but not contentions, deductions or conclusions of fact or law. (*Evans v. City of Berkeley, supra*, 38 Cal.4th at p. 6; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) We determine de novo whether the complaint alleges facts sufficient to state a cause of action under any legal theory. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors, supra,* 48 Cal.4th at p. 42;

McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal.4th 412, 415.) We read the complaint as a whole and its parts in their context to give the complaint a reasonable interpretation. (*Evans v. City of Berkeley, supra,* 38 Cal.4th at p. 6; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We may affirm an order sustaining a demurrer only if the complaint fails to state a claim under any possible legal theory. (*Sheehan v. San Francisco 49ers, Ltd., supra,* 45 Cal.4th at p. 998; *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810.)

When a trial court sustains a demurrer without leave to amend, we determine whether there is a reasonable possibility the defect can be cured by amendment. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) The trial court abuses its discretion if there is reasonable possibility the plaintiff could cure the defect by amending the complaint. (*City of Dinuba v. County of Tulare, supra,* 41 Cal.4th at p. 865; *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.) The plaintiff has the burden of proving the defect would be cured by an amendment. (*Campbell v. Regents of University of California, supra,* 35 Cal.4th at p. 320; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

B. Negligent Misrepresentation

For a negligent misrepresentation claim, plaintiffs must allege: a misrepresentation of a past or existing material fact; the misrepresentation was made without reasonable ground for believing it to be true; the misrepresentation was made with the intent to induce another's reliance on the fact misrepresented; they justifiably relied on the misrepresentation; and they suffered damage. (*Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 196; *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.) Negligent misrepresentation does not require an intent to defraud. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255; *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872,

892.) Plaintiffs assert they have sufficiently alleged an actionable negligent misrepresentation by defendant. Plaintiffs rely on the following allegations: defendant's statement that Royal Roofing Company, Mr. Wills and Mr. Pinkus would "coordinate and handle all aspects of roof preparation and installation of the cellular transmission towers"; the statement Royal Roofing Company, Mr. Wills and Mr. Pinkus would do an excellent job; defendant had no reasonable grounds for believing the representation was true when made; defendant knew or should have known Royal Roofing, Mr. Wills and Mr. Pinkus were in the business of re-roofing and roofing repair; and Royal Roofing, Mr. Wills and Mr. Pinkus were not in the business of asbestos removal.

The foregoing constitutes a non-actionable opinion. A representation is an opinion if it expresses a belief without certainty as to the existence of a fact. Or a representation is an opinion if it is a judgment as to quality, value, authenticity or other similar matters. (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 835; Rest.2d Torts, § 538A.) Generally, to be actionable, a misrepresentation must be of an existing fact, not an opinion or prediction of future events. (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 769; *Gentry v. eBay, Inc., supra,* 99 Cal.App.4th at p. 835 [misrepresentation claim cannot be based on expression of opinion]; *Richard P. v. Vista Del Mar Child Care Service* (1980) 106 Cal.App.3d 860, 865 ["[P]redictions as to future events are deemed expression of opinions, and thus not actionable"].)

Plaintiffs argue defendant's statements are actionable because they concern a technical area of expertise--the installation of cellular towers. An opinion may be actionable where a party holds itself out to be specially qualified concerning a subject. (*Brakke v. Economic Concepts, Inc., supra,* 213 Cal.App.4th at p. 769; *Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 308.) Here, there is no allegation defendant ever held itself out to be specifically qualified on the subject of roofing. The opinion that Royal Roofing Company would do "an excellent job" in coordinating and handling roof preparation and transmission tower installation was not stated as an existing fact. Because defendant's representation is not actionable, plaintiffs fail to state a negligent misrepresentation claim.

C. Negligence

The complaint does not allege a negligence claim against defendant. But plaintiffs argue they pleaded the elements for negligence. To assert a negligence claim, plaintiffs must allege: defendant owed a legal duty to them; defendant breached that duty; and that breach proximately caused injury. (*Conroy v. Regents of University of California, supra,* 45 Cal.4th at p. 1250; *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1188.) Plaintiffs allege they entered into a lease with defendant on August 2010 but no facts are alleged concerning the parties' duties under the lease. Moreover, the complaint does not allege facts showing defendant owed a duty of care to plaintiffs concerning work done by third parties. It is unforeseeable that defendant's limited representations regarding the roofing company's qualifications and workmanship would result in plaintiffs' injuries. (*Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1078; *Lease & Rental Management Corp. v. Arrowhead Central Credit Union* (2005) 126 Cal.App.4th 1052, 1061.) Plaintiffs have not pled all the elements for a negligence claim against defendant.

D. Denial Of Leave To Amend Complaint

Plaintiffs contend the trial court abused its discretion by denying their request to amend the complaint. To begin with, leave to amend involves an exercise of discretion. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 522; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971.) Plaintiffs have failed to provide a transcript or settled statement of the hearing where the trial court exercised discretion. In the absence of a transcript or settled statement, we cannot determine the trial court abused its discretion. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *In re Kathy P.* (1979) 25 Cal.3d 91, 102; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 713-714.)

Further, plaintiffs sought to add the following allegations: "[Defendant] represented to the Kambons and Pan African Art during negotiations regarding the

placement of the cell tower on the subject property that, 'You don't have to worry about it. John Aranas is going to take care of everything.' This statement referred to John Aranas, Construction Manager for T-Mobile LA/OC Construction/Development who was onsite various times during the events described in the Complaint. Concerning Royal Roofing, [defendant] stated that it would be best if the Kambons use Royal Roofing because otherwise they might get a fly by night company. After finding out about the rain damage described in the Complaint, John Aranas of [defendant] remarked that he 'should have been on top of it' about getting Royal Roofing back on the roof after American Integrated Resources, Inc. had finished working." But Mr. Aranas' alleged admission of responsibility is inconsistent with the allegations in the complaint. The complaint alleges defendant stated Royal Roofing Company would "coordinate and handle all aspects of roof preparation and installation of the cellular transmission towers" and do an excellent job. A plaintiff may not amend by adding an allegation that contradicts an admission in the original pleading. (*Astenius v. State* (2005) 126 Cal.App.4th 472, 477 ; *California Dental Assn. v. California Dental Hygienists' Assn.* (1990) 222 Cal.App.3d 49, 53, fn.1 ["[A] plaintiff may not discard factual allegations of a prior complaint, or avoid them by contradictory averments, in a superseding, amended pleading"]; *Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, 405, fn. 6.) Plaintiffs have failed to prove an abuse of discretion occurred. Further, the alleged admission adds nothing in terms of whether defendant offered an actionable opinion.

IV. DISPOSITION

The judgment is affirmed. Defendant, T-Mobile, USA, Inc., shall recover its appeal costs from plaintiffs, Akinsanya Kambon, Tama-sha Kambon, The Gallery Kambon and Pan African Art.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

I concur:

KRIEGLER, J.

MOSK, J., Concurring,

With respect to the negligent misrepresentation claim, I concur because plaintiffs did not allege intent to induce reliance.

MOSK, J.