Filed 3/1/16 Ajrab v. Western Ins. Co. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

GEORGE AJRAB, Plaintiff and Appellant, v. WESTERN INSURANCE COMPANY, Defendant and Respondent.	B255420 (Los Angeles County Super. Ct. No. BC488070)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara Marie Scheper, Judge. Affirmed.

Robert Hindin & Associates, Robert Marc Hindin and Snow Vuong for Plaintiff and Appellant.

Anderson, McPharlin & Conners, Mark E. Aronson for Defendant and Respondent.

INTRODUCTION

Appellant George Ajrab entered into a business deal with a vehicle dealer to purchase cars at an auction and sell those cars, through the dealer's business, at a profit. Ajrab supplied the funds for the vehicle purchases, and the dealer purchased and sold the cars as agreed. Afterward, however, the dealer failed to return Ajrab's investment or share any profits. The dealer eventually returned some of Ajrab's funds; Ajrab sued to recover the remainder and obtained a default judgment.

When the dealer failed to pay the judgment, Ajrab sued respondent Western Surety Company, which had issued a dealer surety bond to the car dealer. Ajrab alleged that he was within the class of persons covered by the bond because he was a "purchaser" who purchased vehicles from the dealer. The trial court sustained Western Surety's demurrer. On appeal, Ajrab contends that the trial court abused its discretion by denying him leave to amend his complaint. We affirm. The facts Ajrab alleged in his complaint show that he is not within the scope of those protected by the bond because he was a business investor who never actually purchased cars. The consumer protection sections of the Vehicle Code therefore do not apply to him, and the trial court did not abuse its discretion by denying Ajrab additional opportunities to amend the pleadings.

FACTUAL AND PROCEDURAL BACKGROUND

A. The underlying case

According to Ajrab, James Barber, a car dealer, approached Ajrab in early 2008 with a "business opportunity." Together they would invest money to purchase cars for a low price at an auto auction, and then sell the cars at a profit. Barber promised Ajrab half the profits, which Barber projected would be a minimum of 40 percent above the auction purchase price. In July 2008, Ajrab gave Barber "$84,500 as my portion of the investment so that we could purchase the automobiles at the auction." Ajrab stated that Barber "purchased 26 cars using solely my money – the $84,500 that I had provided to him as my portion of the investment funds."

Barber then "placed title to all the cars . . . in his name alone." By December 2008, Barber informed Ajrab "that he had sold all the cars, but that there was no profit." Barber repaid Ajrab only $58,500, leaving a balance of $26,000. Barber signed a handwritten promissory note stating, "I owe George Ajrab 26,000. And will pay him between now & March 1, 2009 in full, from money earned from the car lot."

Barber did not repay Ajrab any portion of the $26,000. Ajrab sued Barber for fraud, and sought the unpaid balance, lost profits, and interest. Barber did not appear in the case, and the court entered a default judgment against Barber for $39,336.24 on February 23, 2011.

B. Proceedings below

After Barber failed to pay the 2011 judgment, Ajrab sued Western Surety in July 2012, seeking satisfaction of the judgment. Ajrab alleged in the single-count complaint that he and Barber "entered into a joint business venture wherein [Ajrab] was fraudulently induced to contribute $84,500 to Mr. Barber, an automobile dealer, to purchase cars at wholesale prices for the purpose of resale at a profit. Mr. Barber purchased 26 cars solely with the $84,500.00 monies [sic] provided by [Ajrab]. . . . Mr. Barber then disposed of the cars by whatever means and advised [Ajrab] that there was no profit made. Of the $84,500.00, Mr. Barber repaid [Ajrab] $58,500.00 and executed a promissory note for the remaining $26,000.00."

Ajrab alleged that when Barber "committed fraud" against Ajrab, "there was and is in existence a Dealer Surety Bond." Ajrab alleged that "the Surety's policy authorizes [Ajrab] to sue [Western Surety] directly for recovery of [Ajrab's] judgment against its bondholder."

In addition, Ajrab alleged that Vehicle Code section 11711, subdivision (a) (section 11711(a)) "authorizes [Ajrab] to sue The Surety for recovery of the Judgment." That statute states in relevant part: "If any person . . . shall suffer any loss or damage by reason of any fraud practiced on him or fraudulent representation made to him by a licensed dealer . . . and such person has possession of a written instrument furnished by the licensee, containing stipulated provisions and guarantees which the person believes

have been violated by the licensee . . . then any such person shall have a right of action against such dealer . . . and the surety upon the dealer's bond, in an amount not to exceed the value of the vehicle purchased from or sold to the dealer." Ajrab prayed for the amount of the judgment in the underlying case plus interest.

Western Surety demurred on the basis that Ajrab's claim was time-barred under the three-year statute of limitations in Code of Civil Procedure section 338, subdivision (e), because it was based on Barber's fraud in 2008 and 2009. Western Surety also argued that a cause of action based on section 11711(a) must be based on a written instrument between Ajrab and Barber, and that the promissory note Barber signed did not satisfy this requirement. Western Surety further asserted that the judgment against Barber was not binding on it.

The trial court sustained Western Surety's demurrer, stating, "[A]lthough Plaintiff's claim is based in [sic] written contract/surety bond and is not barred by the fraud statute of limitations, the Court finds the claim is for breach of contract and should be amended to reflect the proper name of the claim." The court gave Ajrab ten days to amend his complaint.

Ajrab filed an amended, single-count complaint, styled as "breach of surety bond." Ajrab's allegations about the transaction with Barber were largely unchanged. He also alleged that Western Surety "undertook and agreed to pay on behalf of [Barber] all sums which [Barber] shall become legally obligated to pay as damages by reason of any fraud practiced, or any fraudulent representations made, by [Barber]." Ajrab also alleged that he and Barber "entered into a joint business venture wherein [Ajrab] was fraudulently induced to contribute $84,500 to [Barber], an automobile dealer, to purchase cars at wholesale prices for the purpose of resale to third parties at a profit. [Ajrab's] role in the venture was to advance funds to purchase the cars." Ajrab alleged that when the default judgment in the underlying action became final, Ajrab, "as a judgment creditor of [Barber], became a third party beneficiary of the contract between [Western Surety] and [Barber]. As a third-party beneficiary, [Ajrab] was and is entitled to immediate payment" from Western Surety.

Ajrab included a copy of the bond as an exhibit to the amended complaint. The principal is listed as "James Rondelle Barber dba Rons Auto Wholesale." The bond states that it is issued in accordance with Vehicle Code sections 11710 and 11711. The bond incorporates language from Vehicle Code section 11710, subdivision (a) (section 11710(a)), stating, "[T]he conditions of the foregoing obligation are that if the Principal shall not practice any fraud or make any fraudulent representation which will *cause a monetary loss to a purchaser, seller, financing agency, or governmental agency*; and, shall not fail to comply with conditions set out in section 11711, then this obligation is to be void; otherwise it shall remain in full force and effect." (Emphasis added; see also section 11710(a) [requiring a condition in a dealer bond "that the applicant shall not practice any fraud or make any fraudulent representation which will cause a monetary loss to a purchaser, seller, financing agency, or governmental agency"].)

Western Surety demurred again, arguing that under section 11710(a) and the language of the bond, "[T]he Bond is very specific as to those entitled to recovery under the Bond. [Ajrab] does not fall under the category of persons protected under the Bond, specifically identified as a purchaser, seller, financing agency, or governmental agency." In addition, Western Surety asserted that Ajrab failed to allege the existence of "a written instrument furnished by" Barber, as required by section 11711(a). Specifically, Western Surety contended that Barber's promissory note could not suffice as a written instrument under section 11711(a), and that the judgment against Barber was not binding on Western Surety.

Ajrab responded that because he "provided funds to Barber to purchase cars," he was therefore "a 'purchaser' and falls under the protected class entitled to recover under the Bond." Ajrab also argued that this was a fact question that was not properly considered in the context of a demurrer.

The trial court sustained the demurrer in a minute order that contains no explanation of the court's reasoning. The court allowed Ajrab leave to amend.

In his second amended complaint, Ajrab repeated his allegations about the joint venture with Barber. He added, however, that he was the "purchaser" of the cars, stating

that he was "fraudulently induced to contribute $84,500.00, *as the purchaser*, to the principal, an automobile dealer, to purchase cars at wholesale prices through the licensed dealer auctions, wherein the principal took ownership of the vehicles in his name." (Emphasis added.) He also alleged, "[Ajrab's] role in the venture was to provide financing for the purchase of cars by the principal for the benefit of [Ajrab]." Rather than stating that Barber "disposed of the cars by whatever means," as he had in the first two complaints, in the second amended complaint Ajrab alleged, "[Barber] then, with the consent of [Ajrab], sold [Ajrab's] vehicles to third parties." Ajrab also added allegations that Barber's promissory note acknowledging the $26,000 unpaid debt was a "written instrument furnished by the principal that satisfies the requirements of Vehicle Code Section 11711."

Western Surety demurred for a third time. Western Surety repeated its assertion that Ajrab was not within the class of persons entitled to recover under the bond, because in order to be a purchaser under section 11711(a), Arjab had to purchase a car from a dealer. Instead, Arjab participated in a joint venture with a dealer. Western Surety also contended that "[t]he Bond was not intended for the protection of persons such as [Ajrab] who made a poor business decision and was unable to recoup some of his investment."

Ajrab responded that whether he qualified as a purchaser was a fact question that should not be determined on demurrer. He also noted that he alleged in the complaint that he "gave $84,500.00 to Barber (the car dealer and bondholder) for the purchase of several vehicles." He added, "Whether [Ajrab] would later elect to retain the vehicles or re-sell the vehicles, title of ownership to the vehicles was to be transferred to [Ajrab's] name because [Ajrab] purchased the vehicles from Barber for $84,500.00." In short, Ajrab argued, he was a purchaser who never received what he purchased. Ajrab also asserted that the allegations in the second amended complaint were sufficient to show that the promissory note was a writing as required by section 11711(a), and to the extent any fact questions remained, they were not appropriate for a demurrer.

The court sustained Western Surety's third demurrer and denied leave to amend. The court noted that the bond protects a "purchaser, seller, financing agency, or

governmental agency." Because Ajrab alleged that he entered into a joint business venture, the court reasoned, he did not fall into any of these categories. The minute order from the demurrer hearing also stated, "Defendant's spoken request to dismiss is granted."

The trial court ordered Western Surety to give notice. The same day as the demurrer hearing, Western Surety filed and served a document titled "Notice of Ruling," stating in part, that the court "sustained Western Surety Company's demurrer to the Second Amended Complaint without leave to amend. The Court will prepare the Order of Dismissal." No further dismissal or judgment appears in the record on appeal, and there is no judgment or other dismissal listed in the case summary printed from the Los Angeles Superior Court website, which is included in Appellant's Appendix.

Ajrab appealed within 60 days of the notice of ruling of the order sustaining Western Surety's demurrer.

DISCUSSION

A. Appealability

A threshold issue in this case is appealability. Neither party has raised the question of appealability, but "[t]he existence of an appealable judgment is a jurisdictional prerequisite to an appeal. A reviewing court must raise the issue on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by Code of Civil Procedure section 904.1." (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.)

It is well established that "[a]n order sustaining a demurrer without leave to amend is not an appealable order; only a judgment entered on such an order can be appealed." (*I. J. Weinrot & Son, Inc. v. Jackson* (1985) 40 Cal.3d 327, 331.) Here, no judgment was entered.[1]

[1] In the alternative, an order dismissing a case may be appealable. (Code Civ. Proc., § 581d.) The court's minute order noted that Western Surety's spoken motion to dismiss was granted. However, "[a]n order that is not signed by the trial court does not qualify as a judgment of dismissal under section 581d." (*Powell v. County of Orange*

However, "when the trial court has sustained a demurrer to all of the complaint's causes of action, appellate courts may deem the order to incorporate a judgment of dismissal, since all that is left to make the order appealable is the formality of the entry of a dismissal order or judgment." (*Sisemore v. Master Financial, Inc*. (2007) 151 Cal.App.4th 1386, 1396.) It would be a waste of judicial resources to dismiss the case, require the parties to pursue a judgment in the trial court, and then re-appeal the same case. On appeal, Western Surety does not challenge the appealability of the order sustaining Ajrab's demurrer. As all parties seem to be in agreement as to the finality of the order on the demurrer, we deem the order on the demurrer to incorporate a judgment of dismissal and will review the merits of the appeal. (See *ibid*.; *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 528.)

B. Standard of review

On appeal following a demurrer, we typically review the ruling on the demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action under any legal theory. (*McCall v. PacifiCare of California., Inc*. (2001) 25 Cal.4th 412, 415; *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 274.)

Here, however, Ajrab does not challenge whether the court properly sustained the demurrer. Instead, he has presented a single issue on appeal: "Did the court abuse its discretion in denying Ajrab leave to amend his complaint to cure the defect?" The standard of review is therefore abuse of discretion: "If the complaint can be cured, the trial court has abused its discretion in sustaining without leave to amend." (*Arce v. Kaiser Foundation Health Plan, Inc*. (2010) 181 Cal.App.4th 471, 482, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The plaintiff has the burden of proving a reasonable possibility that the defect can be cured by amendment. (*Grinzi v. San Diego Hospice Corp*. (2004) 120 Cal.App.4th 72, 78; *Blank, supra*, 39 Cal.3d at p. 318.)

(2011) 197 Cal.App.4th 1573, 1578.) The unsigned minute order therefore is not an appealable order under Code of Civil Procedure, section 581d.

To the extent the parties present a question of statutory construction, we review the issue de novo. (*Ceja v. Rudolph & Sletten, Inc*. (2013) 56 Cal.4th 1113, 1119.)

C. Ajrab does not fall within the scope of protection under Sections 11710(a), 11711(a), or the bond

1. *Neither section 11710(a) nor the language of the bond encompasses a business investor*

"A surety bond is a written instrument in which the surety agrees to answer for the debt, default, or miscarriage of the principal. (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 38, Civ.Code, § 2787.) The surety relationship is a tripartite one, in which the obligee, rather than the principal, is protected by the surety's promise to pay if the principal does not, in exchange for which promise the principal pays the premium for the bond. [Citations.]" (*First National Ins. Co. v. Cam Painting, Inc.* (2009) 173 Cal.App.4th 1355, 1364-1365.)

"In general, a surety bond is interpreted by the same rules as other contracts. [Citation.] That is, we seek to discover the intent of the parties, primarily by examining the words the parties have chosen . . . giving effect to the ordinary meaning of those words." (*Corby v. Gulf Ins. Co*. (2004) 114 Cal.App.4th 1371, 1375.) Where a surety bond is issued pursuant to the requirements of a particular statute, however, the statutory provisions are incorporated into the bond. (*Ibid*.; *Bank of America Nat. Trust and Sav. Ass'n v. Dowdy* (1960) 186 Cal.App.2d 690, 693.)

Here, the bond states that it was issued pursuant to section 11710(a), which provides, "Before any dealer's or remanufacturer's license is issued or renewed by the department to any applicant therefor, the applicant shall procure and file with the department a bond executed by an admitted surety insurer, approved as to form by the Attorney General, and conditioned that [sic] the applicant shall not practice any fraud or make any fraudulent representation which will cause a monetary loss to a purchaser, seller, financing agency, or governmental agency."

Western Surety asserts that to be within the scope of the coverage of the bond, Ajrab must be a "purchaser, seller, financing agency, or governmental agency." Ajrab

does not dispute this interpretation. Instead, Ajrab argues that the court abused its discretion by refusing to allow Ajrab leave to amend his complaint to further allege that he was a "purchaser." The question presented to us, therefore, is whether Ajrab has demonstrated that the trial court abused its discretion by denying him leave to allege additional facts establishing that he was a "purchaser" within the scope of section 11710(a) and the bond.

Ajrab argues that if the trial court had provided the opportunity to further amend, he could have alleged that title to the vehicles purchased at the auction was "supposed to be taken in Ajrab's name. The reason title to the vehicles were [sic] to be taken in Ajrab's name was because he purchased the vehicles from [Barber] by paying [Barber] $84,500.00. . . . Ajrab paid [Barber] $84,500 for the purchase of vehicles from [Barber]; that was the transaction. Ajrab suffered a monetary loss when [Barber] failed to turn over possession of the vehicles, including title, to Ajrab, or, in the alternative, failed to return the entire sum of $84,500 to Ajrab." He adds, "If given the opportunity to amend his complaint, Ajrab could and would cure all defects by pleading the additional facts. . . which would change the legal effect of his complaint because Ajrab would quali[f]y as a purchaser."

The pleadings and the record, however, belie this interpretation. Importantly, the pleadings make clear that Ajrab never actually purchased any cars. At most, Ajrab's proposed amendment suggests that he intended Barber to place the title to the cars in Ajrab's name, but that Barber never did so. Section 11710(a) states that a dealer may not fraudulently "cause a monetary loss to a purchaser," and Ajrab provides no support for his argument that an *intended* purchaser who never purchased any cars from a dealer is included in the definition of "purchaser."

Even if Ajrab could allege that he was the purchaser, section 11710(a) addresses fraud that "cause[s] a monetary loss to a purchaser." Ajrab cannot allege that his monetary loss arose from a vehicle purchase without contradicting his prior pleadings. His original complaint against Western Surety alleged that Ajrab provided Barber with $84,500 "to purchase cars at wholesale prices for the purpose of resale at a profit," and

after Barber "disposed of the cars by whatever means" he "advised [Ajrab] that there was no profit made." In the second amended complaint, Ajrab alleged that "with the consent of [Ajrab], [Barber] sold [Ajrab's] vehicles to third parties. After the vehicles . . . were sold to third parties, [Barber] then claimed there was no profit made from the sale." Ajrab therefore already has alleged that his loss resulted not from a "purchase" of any particular vehicle or vehicles, but rather from Barber's failure to return Ajrab's initial investment or share the promised profit after all of the agreed-upon purchases were complete. Nothing in section 11710(a) or the bond at issue suggests that a bond covering the "monetary loss to a purchaser" provides protection to an investor who contributed funds to a dealer to facilitate the dealer's purchase and sale of cars to third parties. Accordingly, Ajrab is unable to allege facts to support his theory that he is a purchaser and therefore within the scope of those protected by the bond and the related language in section 11710(a).

In addition, the pleadings make clear that the cars were purchased from an auction, not from Barber. In Ajrab's complaint against Barber in the underlying action, which was before the trial court and which Ajrab references in his brief, Ajrab alleged that "Barber took [Ajrab] to the Norwalk Auto Auction, where [Barber] told [Ajrab] which cars he would buy, and requested that [Ajrab] give him [$84,500] for his investment in the purchase of these vehicles, which [Ajrab] did." And in the second amended complaint, Ajrab alleged that he was "fraudulently induced to contribute $84,500.00, as the purchaser, to [Barber], an automobile dealer, to purchase cars through the licensed dealer auctions." The facts previously alleged therefore do not support amendment on the grounds that Ajrab purchased cars *from Barber*, and Ajrab cannot change the pleadings to make such an allegation.

"A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false. [Citation.] Likewise, the plaintiff *may not plead facts that contradict the facts or positions that the plaintiff pleaded in earlier actions or suppress facts that prove the pleaded facts false*. [Citation.]" (*Cantu v.*

Resolution Trust Corp. (1992) 4 Cal.App.4th 857, 877 [emphasis in original].) Ajrab's proposed amendments would contradict his prior pleadings. The trial court did not abuse its discretion by denying Ajrab leave to assert facts that contradict his prior complaints.

2. *Section 11711(a) does not provide a cause of action to a business investor*

Ajrab also alleged that section 11711(a) provides him with a cause of action against Western Surety, because it "authorizes [Ajrab] to sue [Western Surety] for recovery of the Judgment" against Barber. Western Surety argues that Ajrab cannot meet the requirements of section 11711(a). As noted above, that statute states in relevant part: "If any person . . . shall suffer any loss or damage by reason of any fraud practiced on him or fraudulent representation made to him by a licensed dealer . . . and such person has possession of a written instrument furnished by the licensee, containing stipulated provisions and guarantees which the person believes have been violated by the licensee . . . then any such person shall have a right of action against such dealer . . . and the surety upon the dealer's bond, in an amount not to exceed the value of the vehicle purchased from or sold to the dealer."

Western Surety argues that Ajrab has failed to allege the existence of "a written instrument furnished by the licensee, containing stipulated provisions and guarantees which the person believes have been violated by the licensee." Ajrab argues that the promissory note Barber wrote admitting that he owed Ajrab $26,000 meets this requirement. Western Surety points out that the promissory note states that Barber will pay Ajrab "from money earned from the car lot," and makes no reference to a transaction involving the sale of any vehicles.

We agree that section 11711(a) appears to anticipate that the cause of action allowed by that statute relates to a particular transaction rather than a general amount owed. When interpreting a statute, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1232.) "We begin by examining the statutory language because it generally is the most reliable indicator of legislative intent. We give the language its

usual and ordinary meaning, and '[i]f there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs.'" (*Id.* at pp. 1232-1233.)

Section 11711(a) states that "any person" who suffers "any loss" as a result of "any fraud" may bring a cause of action against a car dealer and the dealer's surety. (§ 11711(a).) Although this language is broad, the final phrase of section 11711(a) demonstrates that it is limited to a transaction involving the sale of a vehicle, because it limits damages to "an amount not to exceed the value of the vehicle purchased from or sold to the dealer." Here, according to Ajrab's pleadings, Ajrab invested $84,500 with Barber for the purpose of reselling multiple cars at a profit. The handwritten promissory note, promising to pay Ajrab "from the money earned from the car lot," gives no indication that it is related to any particular vehicle purchase, or that it reflects the value of any vehicle purchased or sold. Rather, Ajrab's pleadings make clear that the promissory note is intended to reflect the unpaid portion of his investment rather than a particular vehicle sale. The promissory note therefore does not support Ajrab's argument that it is a "written instrument furnished by the licensee, containing stipulated provisions and guarantees which the person believes have been violated by the licensee," as required by section 11711(a).

Our Supreme Court has held that the "dominant concern" of the Vehicle Code sections requiring the licensing and bonding of vehicle dealers "is that of protecting the purchaser from the various harms which can be visited upon him by an irresponsible or unscrupulous dealer." (*Merrill v. Department of Motor Vehicles* (1969) 71 Cal.2d 907, 920.) Here, Ajrab's pleadings show that he invested in a business deal with a licensed dealer; he was not a vehicle purchaser in need of statutory protections from unscrupulous practices. He cannot avoid demurrer by contradicting those previously alleged facts. Ajrab therefore has not demonstrated that the trial court abused its discretion by denying leave to amend the complaint to allow him to further allege that he was a "purchaser" protected by the bond and the Vehicle Code.

DISPOSITION

The order of the trial court, interpreted to incorporate a judgment of dismissal, is affirmed. Western Surety is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.