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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

BISNO DEVELOPMENT ENTERPRISE, LLC., Plaintiff and Appellant, v. VINEYARDS DEVELOPMENT, INC., et al. Defendants and Respondents.	B265478 (Los Angeles County Super. Ct. No. BC545320)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Joseph R. Kalin, Judge. Reversed in part, affirmed in part, vacated, and remanded with instructions.

Law Offices of Andrew D. Weiss, Andrew D. Weiss for Plaintiff and Appellant.

Raines Feldman, Miles Feldman, Robert M. Shore, Laith D. Mosely for Defendant and Respondent VDC at the Met, LLC.

Coontz & Matthews, Stephen M. Coontz for Defendant and Respondent Vineyards Development, Inc., Ryan Ogulnick and VDB Santa Ana, LLC.

INTRODUCTION

Plaintiff and appellant Bisno Development Enterprise, LLC appeals from a judgment entered after the trial court granted a motion for summary judgment and struck plaintiff's cross-complaint. The motion for summary judgment was filed by defendants and respondents Vineyards Development, Inc. (Vineyards), Ryan Ogulnick (Ogulnick), and VDB Santa Ana, LLC (VDB Santa Ana). Defendant and respondent VDC at the Met, LLC (VDC at the Met) joined in the motion.

Plaintiff contends the trial court erred in striking its cross-complaint and granting the motion for summary judgment. We hold that the trial court did not abuse its discretion in striking plaintiff's cross-complaint. As to the motion for summary judgment, we affirm the grant of summary judgment as to Vineyards, Ogulnick, and VDB Santa Ana, but we reverse the grant of summary judgment as to VDC at the Met.

BACKGROUND

A. The Underlying Complaint

Plaintiff filed a complaint against Vineyards, Ogulnick, VDB Santa Ana, and VDC at the Met, raising seven causes of action. In general, plaintiff asserted that it assisted defendants

in obtaining (or attempting to obtain) entitlements[1] to construct rental units on a property defendants and/or their related entities were to develop. Ultimately, that property was sold, and plaintiff asserted it was entitled to a share of the profits from that sale due to the services plaintiff purportedly rendered.

Specifically, plaintiff alleged that it entered into a written contract (Entitlements Retention Agreement or "ERA") with Vineyards and Ogulnick, pursuant to which plaintiff would procure entitlements for the property and receive in exchange a 40 percent interest in the profits from the sale of the property.[2] VDB Santa Ana is the successor in interest to Vineyards, and, according to plaintiff, assumed all of Vineyards' obligations under the ERA. Vineyards, along with other investors, formed VDC at the Met for purposes of obtaining entitlements and developing the property.

Plaintiff further alleged that VDC at the Met had purchased the property for $6.1 million and that the property was eventually sold for $17.25 million. Claiming that it "performed all conditions and covenants required to be performed on its part pursuant to the terms of the" ERA, plaintiff sought, inter alia, "the portion of the profits from the sale of the Property assigned to Plaintiff."

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[1] "Entitlements" are discretionary approvals by government authorities with jurisdiction over the property required for development of the property, including, for example, zoning changes, variances for open space and parking requirements, and plan review.

[2] The ERA was attached as exhibit 1 to the complaint and incorporated fully therein.

Accordingly, plaintiff asserted against Vineyards, Ogulnick, and VDB Santa Ana a claim for breach of contract, namely, the ERA (first cause of action). Plaintiff asserted against VDC at the Met the following claims: breach of contract based on a document entitled "Second Amended and Restated Operating Agreement" (second cause of action)[3]; intentional interference with contract, namely, the ERA (third cause of action); and negligent interference with prospective economic advantage (fourth cause of action). Against all four defendants, plaintiff asserted claims for: services rendered (fifth cause of action); conversion (sixth cause of action); and constructive trust (seventh cause of action).

B. The Federal Action

Almost seven months before filing the underlying complaint, plaintiff filed a lawsuit in the Los Angeles County Superior Court against Vineyard's co-members, owners, and/or investors in VDC at the Met, which was later removed to federal court (the federal action). In the federal action, plaintiff asserted claims of fraud, interference with the ERA, quantum meruit, and other related claims. The district court in the federal action granted the defendants' motion for summary judgment, finding, among other things, "based on the uncontroverted evidence, that no version of the alleged ERA is an enforceable contract."

The district court also found "based on the uncontroverted evidence, that [p]laintiff did not suffer any damages from its

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[3] The complaint alleged that the Second Amended and Restated Operating Agreement is the operating agreement for VDC at the Met. Plaintiff claimed that VDC at the Met breached that agreement by failing to distribute to plaintiff profits VDC at the Met received from the sale of the property.

performance of entitlement services." Thus, with respect to plaintiff's quantum meruit claim, the district court explained that "[o]ther than with respect to the purported 40 percent profits interest, [p]laintiff offers no theory or evidence in support of damages on its quantum meruit claim." The district court specifically found that, with respect to the value of its services, plaintiff kept no time records, provided "no evidence in support" of its assigned value of over $10 million for such services, and undisputedly received $8,000 per month for such services pursuant to a separate Independent Contractor Agreement (ICA)[4]. The district court therefore granted summary judgment as to that claim, concluding that "[p]laintiff did not suffer damages from its provision of entitlement services."

C. The Cross-Complaints & Defendants' Motion for Summary Judgment

Ogulnick and Vineyards each filed separate cross-complaints alleging breach of contract claims against plaintiff. Ogulnick and Vineyards later filed a first amended cross-complaint. Before answering the first amended cross-complaint of Vineyards and Ogulnick, plaintiff filed a cross-complaint against Vineyards, Ogulnick, and VDB Santa Ana. The trial court struck plaintiff's cross-complaint on the ground it was filed without leave of court, in violation of Code of Civil Procedure section 428.50.[5]

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[4] The ICA was between plaintiffs and VDC at the Met. Plaintiff incorporated the ICA and attached it to the complaint in the federal action.

[5] All statutory citations are to the Code of Civil Procedure.

Ogulnick, Vineyards and VDB Santa Ana filed a motion for summary judgment arguing that the ruling in the federal action precluded plaintiff's claims in this matter. VDC at the Met joined the motion. The trial court granted the motion, concluding that "the enforceability of the ERA at issue in the first cause of action [for breach of contract] has already been decided against [p]laintiff in the federal action." As for the sixth cause of action (conversion) and seventh cause of action (constructive trust), the trial court noted that both claims were based on the validity of the ERA and accordingly concluded that both causes of action are "barred by collateral estoppel because the federal court decided that the ERA is unenforceable."

With respect to the fifth cause of action (services rendered), the trial court recognized that it was "arguably not based on the alleged contract [i.e., the ERA,] that the federal court found unenforceable" because the complaint alleged more broadly that "Defendants requested, by words or conduct that [p]laintiff perform services necessary to obtain entitlements to the Property." The trial court also noted that, "[i]n the federal action, [p]laintiff alleged a cause of action for quantum meruit in which [p]laintiff alleged that it peformed services under the ERA that resulted in an increase in value of the subject property" and that "[t]he district court found that [p]laintiff had not proven damages in support of the quantum meruit claim." Finding in this case that "the fifth cause of action appeared to be based on the same allegation that plaintiff performed services under the ERA," the trial court concluded that "collateral estoppel bars this claim because the federal district court has already decided, in a final judgment, that [p]laintiff has no evidence of damages."

In granting summary judgment, the trial court did not address any of the causes of action asserted solely against VDC at the Met. The trial court nonetheless entered judgment against plaintiff and in favor of all defendants in this action.

DISCUSSION

A. Striking Plaintiff's Cross-Complaint

Plaintiff contends the trial court abused its discretion by striking its cross-complaint. We disagree.

1. Standard of Review

We review a trial court's ruling on a motion to strike for abuse of discretion. (*Cal-Western Business Services, Inc. v. Corning Capital Group* (2013) 221 Cal.App.4th 304, 309.) We review matters of law de novo. (*Lefebvre v. Southern California Edison* (2016) 244 Cal.App.4th 143, 151.)

2. Analysis

Vineyards and Ogulnick filed a first amended cross-complaint. Before answering that pleading, without leave of court, plaintiff filed a cross-complaint against Vineyards, Ogulnick, *and VDB Santa Ana*, alleging that VDB Santa Ana was the successor in interest to Vineyards. Notably, before plaintiff filed its cross-complaint, the trial court had set a trial date and vacated it. The trial court struck plaintiff's cross-complaint on the ground that it was filed without leave of court, in violation of section 428.50.[6]

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[6] The trial court also struck the cross-complaint on the ground that it fell within the scope of its order granting summary

Section 428.50 governs the timing for filing a cross-complaint as follows: "(a) A party shall file a cross-complaint against any of the parties who filed the complaint or cross-complaint against him or her before or at the same time as the answer to the complaint or cross-complaint. [¶] (b) Any other cross-complaint may be filed at any time before the court has set a date for trial. [¶] (c) A party shall obtain leave of court to file any cross-complaint except one filed within the time specified in subdivision (a) or (b). [¶] Leave may be granted in the interest of justice at any time during the course of the action."

In its cross-complaint, plaintiff named VDB Santa Ana as a cross-defendant, even though VDB Santa Ana had not filed a cross-complaint against plaintiff. Accordingly, subdivision (a) of section 428.50 does not apply to plaintiff's cross-complaint. Although plaintiff alleged, based on information and belief, that VDB Santa Ana was the successor in interest to Vineyards, our conclusion does not change; a mere allegation does not constitute evidence that VDB Santa Ana was a successor in interest to Vineyards and does not compel a finding that a cross-complaint filed by Vineyards should necessarily be deemed VDB Santa Ana's pleading as well.

In addition, subdivision (b) of section 428.50 does not apply to plaintiff's cross-complaint because plaintiff filed its cross-complaint after the trial court had set a date for trial. That the trial court had vacated the trial date does not alter this conclusion. Once a trial court sets a trial date, a cross-complaint against a party other than the original cross-complainant cannot

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judgment. Because we uphold the trial court's action on the ground that plaintiff did not seek leave of court, we do not reach this other ground.

be filed without leave of court, even if the trial date is later vacated. (*Loney v. Superior Court* (1984) 160 Cal.App.3d 719, 723.)

In accordance with subdivision (c) of section 428.50, plaintiff was therefore required to seek leave of court before filing its cross-complaint against Vineyards, Ogulnick, and VDB Santa Ana. But plaintiff did not seek or obtain leave of court. Section 436 provides that the trial court may "at any time in its discretion, and upon terms it deems proper" may "[s]trike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." Because plaintiff did not file its cross-complaint in accordance with section 428.50, the trial court did not err in striking plaintiff's cross-complaint.

B. Motion for Summary Judgment

Plaintiff contends the trial court erred in granting the motion for summary judgment. We agree as to the grant of summary judgment as to defendant VDC at the Met, but we affirm the grant of summary judgment as to defendants Vineyards, Ogulnick, and VDB Santa Ana.[7]

1. Standard of Review

"Our review of the trial court's ruling on the summary judgment motion is governed by well-established principles. ""A trial court properly grants a motion for summary judgment only

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[7] The record does not include a reporter's transcript or a suitable substitute of the hearing on the motion for summary judgment. We find, however, that the record on appeal is adequate to permit our review.

if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. [Citations.] The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish,'" the elements of his or her cause of action. [Citation.]" [Citation.] We review the trial court's decision de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. [Citation.]' [Citation.]" (*Grebow v. Mercury Ins. Co.* (2015) 241 Cal.App.4th 564, 571.)

2. VDC at the Met

Defendants Vineyards, Ogulnick, and VDB Santa Ana filed the motion for summary judgment in which they sought summary judgment *only on the claims asserted against them*. That motion necessarily did not address any of the claims asserted exclusively against defendant VDC at the Met (i.e., the second through fourth causes of action). VDC at the Met merely joined in the motion. VDC at the Met did not file its own motion for summary judgment. Nor did VDC at the Met move for summary adjudication as to the claims addressed in the summary judgment motion pertaining to it (i.e., the fifth, sixth, and seventh causes of action).

A "motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (§ 437c, subd. (c).) By contrast, a motion for summary adjudication may be granted as to one or more of the asserted cause of action for lack of merit. (§ 437c, subd. (f)(1).) Thus, unlike a motion for summary adjudication, a motion for

summary judgment, if granted, must resolve favorably all of the causes of action asserted against the moving party so as to entitle the moving party to a judgment. Where, as here, a defendant has moved only for summary judgment–and not summary adjudication–the motion should not have been granted if there remains any triable issue of fact on any cause of action. (See Weil and Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶ 10:28, pp. 10-3 through 10-4.)

In ruling on the motion for summary judgment, the trial court analyzed only those causes of action asserted against Vineyards, Ogulnick, and VDB Santa Ana and did not analyze any of the causes of action asserted exclusively against VDC at the Met, namely, the second, third, and fourth causes of action.[8] The trial court therefore erroneously granted VDC at the Met summary judgment.

3. Vineyards, Ogulnick, and VDB Santa Ana

Plaintiff contends that summary judgment should not have been granted as to defendants Vineyard, Ogulnick, and VDB Santa Ana because a triable issue of fact remains as to the fifth cause of action (services rendered) asserted against them.[9] We,

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[8] VDC at the Met also moved for judgment on the pleadings as to all causes of action against it, but the trial court found that motion moot in light of its grant of summary judgment. Because the trial court did not reach the merits of VDC at the Met's motion for judgment on the pleadings, we decline to do so here.

[9] Plaintiff does not challenge the trial court's findings that collateral estoppel precluded any of the other causes of action against those defendants, i.e., the first, sixth, and seventh causes

however, agree with the trial court that no triable issue of fact remains as to the claim for services rendered in light of the collateral estoppel effect of the district court's findings and conclusions in the federal action.

"The doctrine of collateral estoppel, 'or issue preclusion, "precludes relitigation of issues argued and decided in prior proceedings."' [Citation.] "'A prior determination by a tribunal will be given collateral estoppel effect when (1) the issue is identical to that decided in a former proceeding; (2) the issue was actually litigated and (3) necessarily decided; (4) the doctrine is asserted against a party to the former action or one who was in privity with such a party; and (5) the former decision is final and was made on the merits." [Citation.]'" (*Greene v. Bank of America* (2015) 236 Cal.App.4th 922, 932-933.)

For purposes of collateral estoppel, a federal judgment is deemed final in the California courts whether the time for appeal from the judgment has expired or whether the there is an appeal pending from that judgment.[10] (*Calhoun v. Franchise Tax Board* (1978) 20 Cal.3d 881, 887.) In determining the estoppel effect of the prior decision, our job is not to second-guess that decision.

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of action for breach of contract, conversion, and constructive trust, respectively. Accordingly, any challenge to those findings is waived. (*Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361 [failure to raise issue in opening brief waives it on appeal].)

[10] When the trial court granted the summary judgment motion, the district court's decision in the federal action was pending appeal. We take judicial notice that the U.S. Court of Appeals for the Ninth Circuit ultimately affirmed the district court's decision.

"The federal court order is entitled to collateral estoppel effect regardless of our agreement or disagreement with the decision itself. 'Regardless of the propriety of the summary judgment, it is nonetheless binding since 'for purposes of application of the doctrine of res judicata, an erroneous judgment is as conclusive as a correct one. [Citation.].'" [Citations.] (*Lumpkin v. Jordan* (1996) 49 Cal.App.4th 1223, 1232.)

With respect to plaintiff's fifth cause of action for services rendered, the trial court held that it was also barred by the doctrine of collateral estoppel, reasoning that "the federal district court has already decided, in a final judgment, that Plaintiff has no evidence of damages" with respect to its claim for quantum meruit in the federal action. We note at the outset that a claim for recovery of the value of services rendered is a claim for "quantum meruit." (See *Bell v. Blue Cross of California* (2005) 131 Cal.App.4th 211, 214, 218.) "To recover on a claim for the reasonable value of services under a quantum meruit theory, a plaintiff must establish both that he or she was acting pursuant to either an express or implied request for services from the defendant and that the services rendered were intended to and did benefit the defendant. [Citation.]" (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 794.)

In its services rendered claim, plaintiff alleged that "[d]efendants have not fully paid Plaintiff for the services rendered." (Complaint ¶ 45). Plaintiff further alleged that the services it rendered were those "services necessary to obtain entitlements to the Property." (Complaint ¶ 43). With respect to an agreement to provide such services, plaintiff re-alleged the allegations in the complaint that plaintiff provided services to obtain entitlements in accordance with the ERA and additionally

alleged that "[d]efendants requested, by words or conduct" that plaintiff provide such services (Complaint ¶42 [re-alleging ¶¶ 7-11 & Ex. A], ¶43). Likewise, in the federal action, plaintiff alleged in the complaint that its quantum meruit claim was based on its provision of services to procure entitlements as contemplated by the ERA and a related agreement—the ICA.

We agree with the trial court's conclusion that collateral estoppel bars plaintiff's services rendered claim because the district court found that plaintiff had no evidence of damages with respect to its quantum meruit claim. In both the instant case and the federal action, plaintiff seeks to recover the value of services it purportedly provided to obtain entitlements for the property. Indeed, it is undisputed that the rendered services at issue in both case are the same—plaintiff's procurement and/or efforts to procure entitlements to the property. Thus, the district court's conclusion that defendant could not prove quantum meruit damages for providing any such services is fatal in this case.

It is immaterial to our analysis that plaintiff alleged somewhat different sources for the understanding that plaintiff is entitled to compensation for services in the federal action (the ERA and/or ICA) and in the instant case (the ERA and/or defendants' "words or conduct"). This is because quantum meruit is a quasi-contract action focused on recovery of the reasonable value of services rendered. (*Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 906.) Indeed, in quantum meruit, recovery rests upon the equitable theory that a contract to pay for services should be implied for reasons of justice. (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419.) Thus, minor differences in pleading the source of plaintiff's

expectation that plaintiff should recover the value of services rendered makes no difference for collateral estoppel purposes because in both actions plaintiff alleges the same services rendered (obtaining entitlements for the property).

Therefore, because the district court determined after full litigation in the federal action that plaintiff had no damages for rendering such services, the trial court was correct to conclude that no triable issue of fact remains with respect to plaintiff's fifth cause of action for services rendered in this case.

DISPOSITION

We affirm the grant of summary judgment as to Vineyards, Ogulnick, and VDB Santa Ana, reverse the grant of summary judgment as to VDC at the Met, vacate the judgment, and remand the matter to the trial court with instructions to enter judgment solely in favor of defendants Vineyards, Ogulnick, and VDB Santa Ana. Upon remittitur issuance, the trial court is to rule on the motion of VDC at the Met for judgment on the pleadings. The parties are to bear their own costs on appeal.

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KIN, J.*

We concur:

TURNER, P. J.

BAKER, J.

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