Filed 3/19/14 Bojorquez v. Horizon Mortgage & Investment Fund CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JUAN MANUEL BOJORQUEZ et al., Plaintiffs and Appellants, v. HORIZON MORTGAGE & INVESTMENT FUND, LLC, et al., Defendants and Respondents.	B241977 (Los Angeles County Super. Ct. No. BC466012)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

Juan Manuel Bojorquez, in pro. per., for Plaintiffs and Appellants.

Law Office of Itai Klein and Itai Klein for Defendant and Respondent, William Lloyd Oses.

Fidelity National Law Group, A Division of Fidelity National Title Group, Inc., and Kevin R. Broersma for Defendants and Respondents, Horizon Management & Investments and David Deshay.

Wargo & French, Mark Block, Shanon J. McGinnis and Jeffrey N. Williams for Respondent, JPMorgan Chase Bank, N.A.

Vaipuna Alfonso, in pro. per., for Defendant and Respondent.

Plaintiffs Juan and Lourdes Bojorquez[1] brought the instant action against several individuals and corporations allegedly involved in a scheme to defraud them of a parcel of property. One defendant successfully moved for judgment on the pleadings while two other defendants' demurrers were sustained without leave to amend plaintiffs' third amended complaint. Judgment of dismissal was entered, and plaintiffs appeal. Plaintiffs impliedly concede that their operative complaint was deficient, but argue that they could state a viable cause of action and therefore should be granted leave to amend. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Plaintiffs' Understanding of the Facts*[2]

This case involves title to a piece of property initially owned by the Bojorquezes' neighbor, Trudi Lee Messick. It appears that Messick was, for at least some time, a drug user. It is alleged by nearly all parties in the instant litigation that Messick was easily manipulated, although the parties disagree on who manipulated her.

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[1] Lourdes Bojorquez is also known as Lourdes Bolanos. For clarity, we refer to her only as Lourdes Bojorquez.

[2] Normally, we would consider the facts as pleaded in the operative complaint, combined with any facts of which we could properly take judicial notice. To present a more complete picture of the facts, we discuss the facts as *argued* by plaintiffs, even when not properly alleged or established by judicial notice.

On September 26, 2006, a deed was recorded conveying title to the property from Messick to Juan Bojorquez.[3] The deed states it is a "gift," and there is no suggestion that plaintiffs paid Messick any consideration for the property.

On October 26, 2006, Messick filed suit to cancel that deed. Messick was represented by Attorney Thomas Chavez in that action. According to plaintiffs, Attorney Chavez was acting not in the interests of Messick, but in the interests of a man named Sal Collins, who wanted the property for himself.[4]

While the action was pending, plaintiffs were harassed and threatened. Their tires were slashed. Verbal threats were made, indicating that if they did not deed the property over, they would be killed.[5]

On June 18, 2007, while allegedly under the duress of the threats, Juan Bojorquez deeded the property to Messick and four of her children. This deed will be of great significance to our analysis. As we shall discuss, plaintiffs challenge several future transfers of the property as fraudulent. However, unless this deed is set aside, it defeats plaintiffs' standing to challenge those future transfers. We refer to this deed as the "June 18 deed."

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[3] Plaintiffs Juan and Lourdes Bojorquez are married. The property was deeded to Juan Bojorquez alone, with no indication that he was married. As the parties raise separate issues as to the standing of each plaintiff, we refer to them individually by their full names.

[4] The property was, at the time, not habitable. Messick was living in a trailer on Collins's property.

[5] The record does not indicate either: (1) who made the threats; or (2) to whom the threatener demanded the property be deeded.

Ten days later, Juan Bojorquez recorded a second deed, purporting to *again* transfer title to the property. This time, however, he purported to transfer the property to the four Messick children *and himself*. He attached to the deed a notarized affidavit directed to the County Recorder, stating that he "made an error" on the June 18 deed. It stated, "Please remove Trudi Lee Messick and add my name back to the Grant Deed. See attached Corrected Grant Deed."[6] As we shall discuss, this deed did not have the effect Juan Bojorquez intended. We will refer to this deed as the "Attempted Corrected deed."

The next deed to be recorded appears to have taken into account both the June 18 deed and the Attempted Corrected deed. On November 20, 2007, a deed was recorded by which Juan Bojorquez, Messick, and the four Messick children – all of the grantees in the June 18 deed and the Attempted Corrected deed – deeded the property to Trudi Messick herself. Plaintiffs would ultimately allege that this deed was a forgery.[7]

Thereafter, on December 7, 2007, a deed was recorded transferring the property from Messick to William Oses. Oses is alleged to be part of the conspiracy with

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[6] Plaintiffs argue that they made this change because, after the June 18 deed was recorded, the Messick children complained that they wanted their mother taken off title because of her drug problem. The plaintiffs do not indicate that the Messick children requested that Juan Bojorquez be returned to title in their mother's place. Nor do plaintiffs indicate whether the duress which allegedly motivated the June 18 deed was a factor in their actions at this time.

[7] This argument is not unpersuasive. Plaintiffs submitted the report of a forensic document examiner indicating that the document is a forgery. Moreover, one of the Messick children was in prison in Oregon at the time he allegedly signed the deed in California.

Collins.[8] Although the deed was recorded in December 2007, it indicates that it was dated and notarized in December 2005.

On December 21, 2007, Attorney Chavez dismissed the action brought in Messick's name to cancel the now superseded September 26, 2006 deed from Messick to Juan Bojorquez. Attorney Chavez indicated that the dismissal was at Messick's request. According to plaintiffs, however, Attorney Chavez dismissed the action because the court had ordered him to produce Messick herself.

In January 2008, Oses obtained a $250,000 line of credit, secured by a deed of trust on the property. The line of credit was from Washington Mutual, which is now JPMorgan Chase Bank, N.A. (Chase). In March 2008, a second deed of trust was recorded in favor of an entity known as Horizon,[9] securing a debt of $50,000.[10]

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[8] Oses would ultimately submit a declaration in support of his demurrer. As a demurrer tests only the legal sufficiency of the complaint, such a declaration cannot be considered. (*Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120, 1126.) However, we note that, in Oses's declaration, he concedes that he was solicited by Collins to become involved with the property. Indeed, according to Oses, Collins represented that he was a relative of Messick, and sought Oses's assistance in making Messick's property habitable.

[9] The deed of trust is in favor of Horizon Management Inc. However, when Horizon subsequently foreclosed, a Trustee's Deed Upon Sale indicated that the purchaser was the foreclosing beneficiary. In that deed, the purchaser was identified as Horizon Mortgage and Investments Fund, LLC. The initial complaint named Horizon Mortgage and Investment Funds as a defendant. When Horizon answered the second amended complaint, it stated its true name was Horizon Management, Inc. On appeal, however, its respondent's brief is filed on behalf of Horizon Management and Investments. We refer to any and all of these entities as "Horizon."

[10] The obligation secured was apparently dated July 1, 2008. There is no explanation for why the deed of trust was recorded more than three months before the obligation it was securing was executed.

Horizon foreclosed; and obtained the property in November 2008 with a credit bid. The record is not entirely clear, but there is a suggestion in the record that Chase may have foreclosed as well.[11] It is clear, however, that the property is no longer owned by plaintiffs, Messick, the Messick children, or Oses.

2. *The Operative Complaint*

The initial complaint was filed by plaintiffs, in pro. per., on July 22, 2011. Plaintiffs filed a first amended complaint shortly thereafter. They were granted leave to file a second amended complaint after they had obtained counsel.[12] Two defendants demurred to the second amended complaint. After opposition was filed, plaintiffs substituted themselves back as counsel in pro. per.[13] The trial court took the demurrers off calendar and granted plaintiffs leave to file a third amended complaint. This is the operative complaint.

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[11] Chase argued, in its demurrer, that it foreclosed and the property was purchased at foreclosure by Horizon. The documents on which it relies, however, clearly indicate that Horizon obtained title when Horizon foreclosed on its own deed of trust. By the time of Chase's respondent's brief, it had realized its error. It is unclear from the record whether Chase ever actually foreclosed, and, if it did not foreclose, who made the payments on the Chase line of credit.

[12] Plaintiffs initially sought to dismiss the action without prejudice and refile it once they had obtained representation. The court instead continued the action to permit plaintiffs time to find counsel.

[13] Their attorney allegedly had a conflict of interest, having been involved in another case with one of the defendants.

The defendants were Horizon,[14] Chase, Oses, Collins, and three notaries who had notarized some of the challenged documents (Brian Love, Vaipuna Alfonso, and Yvette Nogueira). This complaint was clearly deficient. Rather than setting forth factual allegations supporting any particular causes of action, the complaint simply itemized, under the heading, "**ALLEGATIONS**," the causes of action plaintiffs sought to pursue. That list stated, in its entirety: "1. Cancellation of [the deed] recorded 11/20/2007 [from Juan Bojorquez, Messick, and the Messick children to Messick] [¶] 2. Cancellation of [the deed] recorded 12/07/2007 [from Messick to Oses] [¶] 3. Quiet Title of Real Property [¶] 4. Fraud, Deceit, Intentional Misrepresentation [¶] 5. Constructive Fraud [¶] 6. Intentional Infliction of Emotional Distress [¶] 7. Injunction." Thereafter, plaintiffs set forth their understanding of all documents in the chain of title, and, lastly, itemized the relief they sought on each cause of action.[15] Plaintiffs attached as exhibits to their complaint numerous documents, including every document in the chain of title, and evidence supporting their claim that the later deeds were forgeries.[16]

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[14] Plaintiffs also sued David Deshay, an individual associated with Horizon. As they presented a unified defense, references to Horizon shall include Deshay.

[15] Page 6 of the operative complaint is missing from the record on appeal. From the context, it appears that the page contained plaintiffs' claims for relief on the first four causes of action.

[16] On appeal, plaintiffs argue that the trial court erred in taking judicial notice of the documents in the chain of title. The contention is meritless. "Where written documents are the foundation of an action and are attached to the complaint and incorporated therein by reference, they become a part of the complaint and may be considered on demurrer." (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800.) To

With respect to the June 18 deed, plaintiffs specifically alleged that it was executed under duress. However, at no point did they allege that it was voidable, and should be voided, for that reason.

3. *Demurrers and Motion for Judgment on the Pleadings*

Horizon moved for judgment on the pleadings arguing, among other things, that Juan Bojorquez had transferred away his entire interest in the property by the June 18 deed, and the Attempted Corrected deed could not revive any interest in Juan Bojorquez. Chase demurred, also challenging Juan Bojorquez's standing in light of the June 18 deed. Chase also raised the relevant statutes of limitations as a bar to plaintiffs' complaint. Oses also demurred, arguing, among other things, that Lourdes Bojorquez lacked standing as she was never on title to the property. He also argued that the cause of action for intentional infliction of emotional distress was fatally uncertain, and failed to state a claim.[17]

In opposition to the motion for judgment on the pleadings and the demurrers,[18] plaintiffs argued that the court should consider the *substance* of plaintiffs' complaint rather than their allegations. With respect to the challenge to Juan Bojorquez's standing, in light of the June 18 deed, plaintiffs argued that the deed was mistaken and

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the extent the trial court may have impliedly stated some of the challenged deeds were *valid*, that statement has no bearing on our resolution of the appeal, as we must consider de novo whether the complaint states a cause of action.

[17] It does not appear that any other defendants demurred to, or otherwise challenged, the complaint. Nogueira, one of the notaries, filed an answer. There is no indication of any responsive pleading filed by Collins, or the notaries Love and Alfonso.

[18] Plaintiffs had again obtained counsel, who filed the oppositions.

was corrected by the Attempted Corrected deed. Plaintiffs did not argue that the June 18 deed was voidable as the product of duress. As to the challenge to Lourdes Bojorquez's standing, plaintiffs argued that she had an interest as the agent of one of the Messick children.[19] Plaintiffs did not argue that she had a community property interest in the property as Juan Bojorquez's wife. With respect to the cause of action for intentional infliction of emotional distress, plaintiffs specified that the cause of action was based on the forgery of the deed, recorded December 7, 2007, by which Oses took title to the property.[20] Plaintiffs did not argue that the cause of action was based on any continuing course of threatening conduct.

4. *Hearing, Ruling, and Judgment*

At the hearing, the trial court indicated that it was "taking judicial notice of what has been furnished." The court concluded that plaintiffs "do not have standing to object to the change of title" and therefore sustained the demurrers without leave to amend. Plaintiffs argued that they had forensic evidence indicating the later deeds were forgeries; the court was not persuaded that plaintiffs had alleged any particular actionable conduct against any particular parties. The court stated the issue was not one

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[19] It appears that, after the Messick children convinced Juan Bojorquez to record the Attempted Corrected deed removing their mother from title to the property, one of the Messick children wrote a handwritten note to Lourdes Bojorquez, authorizing her to call the police if Messick trespassed on the property, and to sign any legal document concerning the property. It also appears that the Messick children signed a promissory note agreeing to pay Juan Bojorquez $15,000 once the property was sold.

[20] In opposition to Horizon's motion for judgment on the pleadings, plaintiffs conceded they stated no cause of action against Horizon for intentional infliction of emotional distress.

of extrinsic evidence, but one of legal insufficiency of the pleadings. In ruling against plaintiffs, the court stated, "The case is dismissed."

The court signed an order granting Horizon's motion for judgment on the pleadings and indicating judgment shall be entered in favor of Horizon.[21] The order also stated the case "is dismissed in its entirety." Oses was subsequently awarded costs. It appears that the award of costs in favor of Oses was interlineated into the order granting Horizon's motion for judgment on the pleadings.

5. *Appeal*

Plaintiffs filed a timely notice of appeal. Thereafter, plaintiffs abandoned their appeal as to Collins, and the notaries Love and Nogueira.[22]

ISSUES ON APPEAL

On appeal, plaintiffs concede that their operative complaint was inadequate, but argue the trial court erred in not permitting them leave to amend. Specifically, they argue that they could amend their complaint to properly allege that the June 18 deed

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[21] On appeal, plaintiffs argue that the trial court failed to state reasons for its ruling. Having failed to notify the court of its failure, plaintiffs have waived the issue. (*Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 962.)

[22] We have some concern regarding the identity of the proper parties to this appeal. While, clearly, the court's dismissal was intended to apply to Horizon, Oses, and Chase (the moving defendants), it is not at clear whether it was intended to apply – and, indeed, could apply – to defendants who had not demurred or filed a motion for judgment on the pleadings. Defendant Nogueira had answered the complaint. There is no indication that the other defendants (Collins, Love, and Alfonso) had appeared in the case at all, although Alfonso has since filed a brief in pro. per. on appeal. Our disposition of the appeal relates only to the defendants in whose favor judgment could have been entered, and who, therefore, are proper parties to this appeal: Chase, Horizon, and Oses.

was voidable as signed under duress, which would grant Juan Bojorquez standing to challenge the later deeds as forgeries. They further argue that they could amend their complaint to properly allege that Lourdes Bojorquez possessed a community property interest in the property, so she, too, has standing to challenge the later deeds as forgeries. We reject both of these arguments. As such, neither plaintiff has standing to pursue a complaint regarding title to the property. Plaintiffs' sole cause of action unrelated to their complaints relating to title is the cause of action for intentional infliction of emotional distress; this cause of action is either fatally uncertain or time-barred. As plaintiffs could not state a valid cause of action, the trial court did not err in denying them leave to amend.

DISCUSSION

1. *Standard of Review*

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and

we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"To meet [the] burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing court." (*William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1621.)

A motion for judgment on the pleadings may be made on the ground as for a general demurrer, that the pleading at issue fails to state facts sufficient to constitute a legally cognizable claim or defense. (*Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 411-412; *Sofias v. Bank of America* (1985) 172 Cal.App.3d 583, 586; Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).) Our standard of review is the same.

2. *Juan Bojorquez Lacks Standing*

Juan Bojorquez concedes that he executed that June 18 deed, which divested him of title. If that deed is given effect, he lost title to the property and never regained it. Therefore, he would have no standing to complain of fraud or forgery regarding later documents in the chain of title. Juan Bojorquez has two arguments against the effectiveness of June 18 deed. First, he argues that it was superseded by the Attempted Corrected deed recorded ten days later. Second, he argues that the June 18 deed is voidable due to duress, and that, if given leave to amend, he could state a cause of action to void the June 18 deed.

Juan Bojorquez's argument that the Attempted Corrected deed superseded the June 18 deed is meritless. He argues that the Attempted Corrected deed was "effective in restoring [his] interest in the Property, as it was examined by the Los Angeles County Recorder's office supervisor and accepted for recording." This is incorrect. Recording a void document does not render it valid. (*City of Los Angeles v. Morgan* (1951) 105 Cal.App.2d 726, 733.) If the Attempted Corrected deed could not restore Juan Bojorquez's title, the recorder's act in recording it cannot change that. In fact, the Attempted Corrected deed was invalid. A corrective deed is permissible when it is between the same grantor and grantee as the original deed, and corrects a minor error. However, a corrective instrument is ineffective if it purports to diminish the original grantee's rights in some way. (1 Patton and Palomar on Land Titles § 83.) An attempt to change the name of the original grantee, even if due to mistake, cannot be effectuated by a corrective deed. Once the original deed conveyed title to the original grantee, it is the original grantee alone, not the original grantor, who has power to convey title. (*Walters v. Mitchell* (1907) 6 Cal.App. 410, 412-413.) Thus, in this case, the June 18 deed conveyed title from Juan Bojorquez to Messick and the Messick children. Juan Bojorquez could not change this by the Attempted Corrected deed.

Juan Bojorquez's next argument is that the June 18 deed is voidable as it was signed under duress. It is true that a deed signed under undue influence is voidable. (*Fallon v. Triangle Management Services, Inc.* (1985) 169 Cal.App.3d 1103, 1106.) However, until such a deed is declared void, it is fully operative. (*Ibid.*) Assuming that Juan Bojorquez amended his complaint to state a cause of action to void the June 18

deed because of duress, such a cause of action would be barred by the statute of limitations. A three-year statute applies to such a cause of action. (Code Civ. Proc., § 338, subd. (d); *Arthur v. Davis* (1981) 126 Cal.App.3d 684, 690; cf. *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 207-208.) Plaintiff recorded the June 18 deed under duress on June 18, 2007; plaintiffs' complaint in the instant action was filed July 22, 2011, more than four years later. The cause of action is clearly time-barred. As such, Juan Bojorquez *cannot* pursue invalidation of the June 18 deed; the deed remains operative, and he lacks standing to challenge any subsequent transfer.

3. *Lourdes Bojorquez Also Lacks Standing*

On appeal, plaintiffs argue that Lourdes Bojorquez acquired a community property interest in the property when her husband initially acquired the property in September 2006. As Lourdes Bojorquez never deeded away her interest in the property, she argues that she still possesses that interest, and therefore has standing to challenge the subsequent transactions. We disagree.

Juan Bojorquez obtained title as a gift. As such, the property constituted his separate property. (Fam. Code, § 770, subd. (a)(2).) Faced with this argument, plaintiffs argue in their reply brief that they could allege an "understanding" that the property was community property. It is true that a married couple may enter into a transmutation agreement to render separate property community property. (Fam. Code, § 850.) However, when the agreement pertains to real property, it must be in writing. (Fam. Code, § 852, subd. (a).) Plaintiffs argue only that they could allege an understanding, not a written transmutation agreement. Moreover, a transmutation of

real property is not effective as to third parties without notice thereof unless the document is recorded. (Fam. Code, § 852, subd. (b).) Plaintiffs clearly never recorded any transmutation agreement, and they do not indicate that they can allege defendants had any knowledge of their private "understanding" that the property was community property. In short, as to defendants, the property was Juan Bojorquez's separate property, and Lourdes Bojorquez had no interest in it. Thus, she has no standing to challenge transfers of the property.

3. *The Cause of Action for Intentional Infliction of Emotional Distress Is Fatally Uncertain or Time-Barred*

According to the operative complaint, plaintiffs suffered verbal threats to return the property which began in 2007 and "many other incidents from 2007 – 2011 where the police had to be called on several occasions." Oses demurred to complaint on the basis that the intentional infliction of emotional distress cause of action did not state facts sufficient to state a cause of action, and that the cause of action was uncertain. He specifically argued that plaintiffs failed to describe the conduct constituting the alleged infliction of emotional distress. In opposing the demurrer, plaintiffs specified that the cause of action for intentional infliction of emotion distress was based on the forgery of the deed, recorded December 7, 2007, by which Oses took title to the property.

A cause of action for intentional infliction of emotional distress is subject to a two-year statute of limitations. (Code Civ. Proc., § 335.1.) If plaintiffs base their

cause of action for intentional infliction on the deed recorded in December 2007, their complaint filed in July 2011, more than three years later, is clearly barred.[23]

On appeal, in order to defeat the argument that the cause of action is time-barred, plaintiffs do not rely on the purportedly fraudulent deed to Oses. Instead, plaintiffs suggest that, since they alleged "incidents" continuing into 2011, and did not specify the point at which point the conduct became so extreme and outrageous to support a cause of action, it cannot be determined when the statute of limitations commenced. We disagree. Plaintiffs cannot rely on the lack of specificity in their complaint to survive demurrer.

Clearly, the complaint is time-barred as to the death threats and tire-slashing of 2007. It is similarly time-barred as to the recording of all relevant deeds. If plaintiffs could timely pursue a cause of action for intentional infliction of emotional distress, it would have to be based on actions occurring after July 22, 2009. While plaintiffs' complaint does suggest some "incidents" occurred during this time period, plaintiffs have not indicated to this court in what way they could amend their complaint to properly allege facts, within the time period, which would support a cause of action for intentional infliction of emotional distress.

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[23] Plaintiffs make no attempt to suggest they were unaware of the deed for any significant length of time.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.