Filed 7/30/15 Keough v. Heryford CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DANIEL E. KEOUGH, as Trustee, etc., Plaintiff and Appellant, v. GLORIA HERYFORD, et al., as Trustee, etc., Defendants and Respondents.	B257198 (Los Angeles County Super. Ct. No. BC515498)

APPEAL from an order of the Superior Court of Los Angeles County, Terry A. Green, Judge. Reversed and remanded.

Dijulio Law Group, R. David DiJulio and Tiffany Krog for Plaintiff and Appellant.

Gibeaut, Mahan & Briscoe, Greg W. Gibeaut and Julie A. Mullane for Defendants and Respondents.

INTRODUCTION

Plaintiff Daniel Keough appeals from the order of dismissal entered after the trial court sustained without leave to amend the demurrer of defendants Gloria Heryford, Laurel Schulman, James Schulman and USAA (collectively, the defendants) to his original complaint. Keough and Heryford own neighboring residential properties and, in a prior suit, settled claims concerning the ownership and remediation of the hillside spanning both properties. In the present suit, Keough seeks to enforce the settlement agreement. Primarily, Keough claims the defendants breached the settlement agreement by building a retaining wall at the top of the hillside, near Heryford's home, rather than "at or upon the boundary line between the Keough property and Heryford property" as required by the settlement agreement.

The defendants demurred to Keough's complaint, asserting the settlement agreement requires Keough to present his claims directly to Judge Charles G. Rubin (Ret.), the private judge who assisted the parties in settling the first case. The trial court sustained the demurrer without leave to amend. Because the court failed to provide a statement of reasons for its decision, we must assume the court sustained only the general demurrer asserted by the defendants, based on its conclusion that it did not have subject matter jurisdiction in this case. We disagree. Accordingly, we reverse the dismissal order and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Keough and Heryford own neighboring residential properties that share a hillside. Heryford's home sits on the top of the hill and Keough's home sits at the bottom of the hill. For more than 30 years, Keough maintained and improved the entire hillside because he believed the hillside was on his property. In 2008, a dispute arose over the location of the property line. On February 10, 2009, Keough filed a complaint against Heryford, alleging he acquired title to Heryford's portion of the hillside by adverse possession or, at a minimum, possessed a prescriptive easement to use the portion of the hillside he had improved. (BC 408959.) In response, Heryford filed a cross-complaint alleging Keough's improvements destabilized the hillside. The trial

court bifurcated the suit and tried Keough's complaint first. The court found Keough acquired a prescriptive easement to use the improved areas of the hillside and issued a permanent injunction against Heryford, prohibiting her from obstructing Keough's access to the improved portion of her property. However, the court did not immediately enter judgment, but instead referred the matter to Judge Charles G. Rubin (Ret.) prior to holding a trial on the cross-complaint.

With the assistance of Judge Rubin, the parties reached mutually agreeable settlement terms and signed an agreement that ultimately became the award of the arbitrator.[1] The agreement required Heryford to construct a retaining wall "at or upon the boundary line" between the two properties. In addition, the agreement required Keough's insurer, State Farm General Insurance Company, to pay $610,000 to Heryford, and required Heryford's insurer, USAA, to pay $17,000 to Keough. The parties agreed to (and did) dismiss their actions against one another. They also executed a mutual release of all claims.

Pertinent here, the agreement includes three provisions concerning its enforcement. Paragraphs 3 and 4 call for continuing jurisdiction of the superior court in order to enforce the settlement. In pertinent part, paragraph 3 states that Heryford and Keough would "jointly request, if necessary, the Court to dismiss the Keough Complaint and Heryford Cross-Complaint with prejudice with the Court retaining jurisdiction to enforce the settlement pursuant to Code of Civil Procedure section 664.6."[2] Similarly, paragraph 4 of the award states, "[t]he parties consent to the continuing jurisdiction of the Los Angeles County Superior Court regarding

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[1] We refer to the arbitrator's award incorporating the settlement agreement as "the agreement."

[2] Code of Civil Procedure section 664.6 provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." (Code Civ. Proc., § 664.6.)

enforcement of this Agreement." Further, paragraph 4 states, "[t]he parties agree that on failure to comply with the terms of this settlement, a party may apply ex parte for entry of judgment on 48 hours notice to opposing counsel(s) and shall be entitled to reasonable attorney's fees required to enforce the terms of this settlement." The third enforcement provision, paragraph 6(f), states that "[a]ny disputes arising out of the terms or execution of this agreement shall be submitted to Judge Charles G. Rubin for binding arbitration."

The parties executed the agreement on February 15, 2012, and Judge Rubin (Ret.) signed the arbitrator's award on March 5, 2012. The agreement is signed by Keough, Heryford, USAA (Heryford's insurer), and State Farm General Insurance Company (Keough's insurer). Laurel Schulman (Heryford's daughter) and James Schulman (Heryford's son-in-law and an attorney of record in the prior suit) also signed the agreement. The Schulmans have resided with Heryford since 2009.

On April 8, 2013, Keough filed an ex parte application seeking to enforce the terms of the agreement pursuant to Code of Civil Procedure section 664.6.[3] In general terms, Keough alleged that although Heryford received the $610,000 payment from his insurer shortly after the parties signed the settlement agreement, she had not yet begun construction of the retaining wall even though more than a year (and two rainy seasons) had passed.

On April 24, 2013, the trial court denied Keough's ex parte application. The court stated section 664.6 relief is only available in pending litigation.[4] Accordingly,

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[3] All further code references are to the Code of Civil Procedure.

[4] Keough does not (and could not) challenge the court's April 24, 2013 order in the present appeal. However, for the benefit of the trial court, we note section 664.6 allows parties to consent to the trial court's continuing jurisdiction over them for the limited purpose of enforcing a settlement agreement, even after they dismiss their case. (See Code Civ. Proc., § 664.6 ["If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement"]; *Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 433 ["We hold that the effect of [the 1993] amendment [to section 664.6] is to provide courts with

the court concluded section 664.6 relief was unavailable to Keough because, in furtherance of the settlement, Keough and Heryford had dismissed their complaint and cross-complaint and therefore the action was no longer pending. The court also noted the agreement calls for binding arbitration of future disputes.

On April 25, 2013, Keough filed a second ex parte application, this time seeking a temporary restraining order. Keough asserted that Heryford began to construct a retaining wall and the construction caused a portion of the hillside to slide onto his property. Further, he alleged the placement of the wall did not comply with the terms of the settlement agreement. The court denied Keough's second ex parte application without explanation.

On July 18, 2013, Keough initiated the present lawsuit against Heryford, James and Laurel Schulman, and USAA (collectively, the defendants). (BC 515498.) Primarily, Keough's complaint alleges the defendants breached the settlement agreement by constructing the retaining wall on the upper portion of the hill near the Heryford house, rather than "at or upon the boundary line between the Keough property and Heryford property," as required by the settlement agreement. Keough alleges the location of the wall as well as the placement of plastic sheeting upon the hillside during construction increased ground instability on the portion of the hillside on Keough's property, which will require him to make substantial (and expensive) remediation efforts.

In addition to the cause of action for breach of contract and a request for specific performance, Keough's complaint contains three additional causes of action for fraud, public nuisance, and money had and received. Keough alleges the defendants never intended to construct the retaining wall at the agreed-upon location and therefore fraudulently induced him to sign the settlement agreement. He also contends the chain link fence erected by Heryford and the plastic sheeting placed on the hillside during construction constitute a public nuisance. Finally, with respect to the cause of action for

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continuing jurisdiction over parties and their litigation, for the purpose of enforcing their settlement agreement, despite a suit's having been dismissed . . . . "].)

money had and received, Keough alleges the defendants received $610,000 from USAA in order to construct a retaining wall compliant with the terms of the agreement, but improperly built a cheaper and less effective wall to the detriment of Keough, while retaining the excess funds as "profit."

On August 23, 2013, the defendants filed a demurrer to Keough's complaint. Defendants demurred to the complaint on three grounds: "1. The [c]ourt lacks jurisdiction of the subject of the causes of action alleged in the pleading[;] 2. All causes of action fail pursuant to another action, *Keough v. Heryford*, LASC Case No. BC 408959, which was dismissed[;] 3. All causes of action fail as to Defendants James A. Schulman, Laurel Shulman [*sic*], and USAA, who are improper parties." On May 14, 2014, the trial court heard argument on the demurrer. The court sustained the demurrer without leave to amend and dismissed the complaint on May 28, 2014. Keough timely appeals.

STANDARD OF REVIEW

"A demurrer tests the legal sufficiency . . . in a complaint. We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We construe the pleading in a reasonable manner and read the allegations in context. [Citation.]" (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 81.)

DISCUSSION

1. *Scope of Review*

A court sustaining a demurrer without leave to amend is required to state "the specific ground or grounds upon which the decision or order is based . . . . " (Code Civ. Proc., § 472d.) Here, the trial court sustained defendants' demurrer without leave to amend in general terms, contrary to section 472d. Although the court's failure to

specify the grounds on which it sustained the demurrer constituted error, the record does not indicate that Keough called this error to the attention of the trial court and he makes no mention of the issue on appeal. Keough "must therefore be held to have waived the protections of the section." (*E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 504, fn. 2 (*E. L. White*).)

In general, and regardless of this error, a court's ruling will be upheld if any of the grounds stated in the demurrer is well taken. (See *E. L. White*, *supra*, 21 Cal.3d at p. 504, fn. 2; *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111 (*Fremont Indemnity*).) However, as relevant here, if "a demurrer made on general and special grounds is sustained without leave to amend without specifying the grounds for the decision, the reviewing court must assume that the court sustained only the general demurrer and did not rule on the special demurrer. (*Briscoe v. Reader's Digest Association, Inc.* (1971) 4 Cal.3d 529, 544, overruled on another point in *Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679, 685, 697, fn. 9; see *E. L. White, supra*, 21 Cal.3d at p. 504, fn. 1.) (*Fremont Indemnity, supra*, 148 Cal.App.4th at pp. 111-112.)

Here, the defendants asserted three grounds in their demurrer: lack of subject matter jurisdiction, existence of a pending action between the parties, and misjoinder of parties. (See Code Civ. Proc., § 430.10, subds. (a),(c) & (d).) Only the first of these grounds qualifies as a general demurrer for our purposes. (See *Buss v. J. O. Martin Co.* (1966) 241 Cal.App.2d 123, 133.) Accordingly, we consider only whether the allegations of the complaint are sufficient to withstand the defendants' challenge to the trial court's subject matter jurisdiction.

2. *The Trial Court Does Not Lack Subject Matter Jurisdiction*

Section 430.10, subdivision (a), provides that a party may demur to a cause of action or complaint if "[t]he court has no jurisdiction of the subject of the cause of action alleged in the pleading." (Code Civ. Proc, § 430.10, subd. (a).) "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the

parties." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) Subject matter jurisdiction refers to the court's power to hear and resolve a particular dispute or cause of action. (*Donaldson v. National Marine, Inc.* (2005) 35 Cal.4th 503, 512; *Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014, 1029-1030.) The California Constitution confers broad subject matter jurisdiction on the superior court. (Cal. Const., art. VI, § 10.) The subject matter jurisdiction of the superior court is limited in certain circumstances, however, such as in areas of exclusive federal jurisdiction (see 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, §§ 74–80, pp. 641–647), matters within the exclusive jurisdiction of an administrative agency (see *id*., § 48, pp. 616-617), and where jurisdiction is vested in a reviewing court as a result of the filing of a notice of appeal (see *id*., § 95, pp. 667–668).

The defendants assert the trial court lacks jurisdiction over the present case because paragraph 6(f) of the settlement agreement provides that "[a]ny disputes arising out of the terms or execution of this agreement shall be submitted to Judge Charles G. Rubin for binding arbitration." The defendants contend this provision requires Keough to submit his complaint directly to Judge Rubin and thereby deprives the trial court of subject matter jurisdiction in this matter. Keough disagrees, citing paragraph 4 of the settlement agreement which states that "[t]he parties consent to the continuing jurisdiction of the Los Angeles County Superior Court regarding enforcement of this Agreement."

By the complaint and demurrer, the parties offer differing and contradictory interpretations of their agreement to arbitrate issues relating to the agreement. The trial court plainly has jurisdiction over that dispute. "Private arbitration is a matter of agreement between the parties and is governed by contract law." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313; *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944 ["When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts"].) Like other contracts, arbitration agreements are to be construed to give effect to the mutual intention of the parties.

(Civ. Code, § 1636; see *In re Tobacco Cases I* (2004) 124 Cal.App.4th 1095, 1104.) Where, as here, a question concerning arbitrability exists, it is role of the trial court to examine and, to some extent, construe an arbitration agreement to determine whether a duty to arbitrate a particular dispute exists. (*Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 480 ["The clear purpose and effect of [Code of Civil Procedure] section 1281.2 is to require the superior court to determine in advance whether there is a duty to arbitrate the controversy which has arisen. The performance of this duty necessarily requires the court to examine and, to a limited extent, construe the underlying agreement."].)

On remand, the defendants may file a petition to compel arbitration under section 1281.2 in lieu of filing an answer to the complaint. (Code. Civ. Proc., § 1281.7.) Section 1281.2 provides: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy *if it determines that an agreement to arbitrate the controversy exists* . . . . " (Italics added.) The nature of the proceeding to resolve a petition to compel arbitration under California law was explained by the Supreme Court in *Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394 (*Rosenthal*). As the Court explained, sections 1281.2 and 1290.2 create a summary proceeding for resolving these petitions. (*Rosenthal, supra*, 14 Cal.4th at p. 413.) The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. (*Ibid*.) In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. (*Id*. at pp. 413-414; see also *Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653 ["In ruling on a petition to compel arbitration, the trial court may consider evidence on factual issues relating to the threshold issue of arbitrability,

i.e., whether, under the facts before the court, the contract excludes the dispute from its arbitration clause or includes the issue within that clause. [Citations.]"].)

We leave all remaining issues, including the interpretation of the agreement, to the trial court's sound judgment.

DISPOSITION

The order of dismissal is reversed. The trial court is directed to vacate its order sustaining the defendants' demurrer without leave to amend and to conduct further proceedings not inconsistent with this opinion. Appellant awarded costs on appeal.

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JONES, J.*

WE CONCUR:

EDMON, P. J.

ALDRICH, J.

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