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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

YISROEL DAVID KAGAN, Plaintiff and Appellant, v. JULIAN ZABLEN, as Trustee, etc., Defendant and Respondent.	B242437 (Los Angeles County Super. Ct. No. BC447093)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Malcolm Mackey, Judge. Reversed in part. Affirmed in part.

Revere & Wallace and Frank Revere for Plaintiff and Appellant.

Baker & Hosteteler, Michael R. Matthias, Morvareed Z. Salehpour and Thomas Warren for Defendants and Respondents.

Landlord Julian Zablen (Zablen) previously sued tenant Yisroel David Kagan for breach of a commercial lease. Judgment was entered for Zablen, a writ of possession was issued, and Kagan vacated the premises.

Kagan appealed. This court reversed the judgment, holding Zablen's stated reason for declaring Kagan's default under the lease did not, as a matter of law, constitute a material breach of the lease. By that time, however, Zablen no longer owned the real property at issue and could not restore Kagan to his rights under the lease.

Kagan then filed this lawsuit seeking damages for Zablen's breach of the lease and for various tort causes of action. The trial court sustained Zablen's demurrer to Kagan's tort-based claims. Kagan challenges that ruling as to one of those causes of action. Finding no error, we affirm the order sustaining the demurrer.

Zablen moved for summary judgment, arguing that, pursuant to the terms of the lease, he had no liability to Kagan subsequent to his sale of the property. The trial court agreed, and entered judgment in favor of Zablen.

Kagan argues *Munoz v. MacMillan* (2011) 195 Cal.App.4th 648, supports his contention that, based on the undisputed facts, he has established a right to pursue recovery of damages resulting from his eviction. We agree and reverse the summary judgment, as well as the fees awarded to Zablen as the prevailing party under the lease.

I. FACTUAL AND PROCEDURAL BACKGROUND

Starting in 1960, Kagan's mother rented the commercial real property from Zablen located at 452, 454 and 456 North Fairfax Avenue (the "Premises"). Kagan's mother died in 2002, and the then extant lease expired in April 2004. Kagan and Zablen entered into a new lease of the Premises, commencing on May 1, 2004, with a five-year term renewable, at plaintiff's option, for two additional terms of five years each (the "Lease"). Kagan operated a butcher shop on some of the Premises, and with Zablen's permission subleased a portion of the Premises to a third party for use as a grocery store. Before and after the new lease was executed, Chabad on Fairfax operated a gift shop on a portion of

the leased Premises, a business Kagan's mother had owned before her death and which was sold to Chabad by her estate in March 2003. As the trial court found in the earlier proceeding, Zablen did not become aware of the Chabad sublease until approximately October 2007. Zablen's earlier lawsuit for breach of the Lease was based on Kagan's sublet of the gift shop premises to Chabad without the landlord's prior consent. (*Zablen v. Kagan* (Apr. 15, 2010, B216835) [nonpub. opn.].)

As noted above, Kagan's appeal of the judgment in Zablen's favor resulted in a reversal. The trial court entered an amended judgment to reverse the cancellation of the Lease. However, because Zablen had since sold the property, Kagan had no ability to resume possession of the Premises under the Lease.

Kagan then filed this lawsuit seeking damages for Zablen's breach of the lease and alleging additional causes of action sounding in tort. One such tort claim, for intentional interference with advantageous business relations, named Zablen's nephew, Marshall Zablen, as a defendant.

Defendants demurred to all of the causes of action. The trial court sustained the demurrers to all but two contract-based claims. The third cause of action for breach of the covenant of quiet enjoyment alleged: "By the Lease, [Zablen] covenanted to provide [Kagan] with continuous possession and the quiet enjoyment of the Premises. In breach of this covenant, [Zablen] interfered with [Kagan's] use and enjoyment of the Premises by failing to allow him possession on July 23, 2010, the effective date of the Remittitur." The sixth cause of action for breach of contract alleged: "By the Lease, [Zablen] is contractually obligated to, among other things, provide [Kagan] with possession and quiet enjoyment of the Premises. [¶] . . . [¶] On or about October 8, 2010, [Kagan], by service of the summons and complaint in this matter gave [Zablen] notice that [Kagan] demands [Zablen] to perform his obligations under the Lease to afford [Kagan] possession of the Premises. [¶] On or about July 23, 2010 and continuing, [Zablen] has breached the Lease by failing to place [Kagan] in possession of the Premises." Thus, the complaint alleged Zablen breached his obligations under the Lease only after this court

reversed the earlier judgment in Zablen's favor, by which time he no longer owned by property.

Zablen moved for summary judgment, based on a Lease provision which stated the Landlord was not liable for obligations arising after the date of any transfer of the property subject to the Lease. The trial court agreed and entered summary judgment.

Zablen and Marshall then filed a motion for attorney fees, based on a provision of the Lease. The court granted the motion and awarded fees in the amount of $164,465.50 plus $975 in costs for a total of $165,440.50.

Plaintiff timely appealed the judgment.

II. DISCUSSION

1. Causes of action for breach of Lease and breach of covenant of quiet enjoyment

"On appeal from a summary judgment, our task is to independently determine whether an issue of material fact exists and whether the moving party is entitled to summary judgment as a matter of law. [Citation.] 'We independently review the parties' papers supporting and opposing the motion, using the same method of analysis as the trial court. Essentially, we assume the role of the trial court and apply the same rules and standards.' [Citation.] We apply the same three-step analysis required of the trial court. First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable issue of material fact. [Citations.] In so doing, we liberally construe the opposing party's evidence, strictly construe the moving party's evidence, and resolve all doubts in favor of the opposing party. [Citations.]" (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493-494.)

In his motion for summary judgment, Zablen argued the terms of the Lease relieved him of liability for Kagan's claims, entitling him to judgment as a matter of law. The provision in question, titled "26. LANDLORD'S LIABILITY," provided, in part, as follows: "The term 'Landlord' as used in this Lease shall mean only the owner or owners at the time in question of the fee title or a Lessee's interest in a ground lease of the Premises, and in the event of any transfer of such title or interest, Landlord herein named (and in case of any subsequent transfers to the then successor) shall be relieved from and after the date of such transfer of all liability in respect to Landlord's obligations thereafter to be performed." Zablen maintained that, because the complaint alleged Zablen breached the Lease "by failing to place [Kagan] in possession of the Premises" after the trial court had amended the judgment canceling the Lease, paragraph 26 insulated him from liability for this claim.

Kagan cites *Munoz v. MacMillan, supra,* 195 Cal.App.4th at pages 651-654 to argue the undisputed facts of this case state a cause of action for breach of lease and breach of the covenant of quiet enjoyment, irrespective of the terms of the Lease. In that case, the landlord sued his tenant for unlawful detainer after the expiration of the initial term of a commercial lease. The landlord obtained judgment and a writ of possession, and evicted the tenant. After the tenant prevailed on appeal, she sued the landlord for breach of contract, "'by causing law enforcement officials to evict . . . [her] in violation of the terms of the lease.'" (*Id.* at p. 653, fn. 2.) The trial court granted the landlord's summary judgment motion, ruling the tenant had no cause of action based on her eviction from the premises which was secured by judicial processes. (*Id.* at pp. 651-654.) The tenant appealed that ruling.

The appellate court framed the question presented thus: "Does a tenant's right to sue for breach of lease survive an initial unfavorable judgment and judicially sanctioned eviction, when the initial judgment is ultimately reversed?" (*Munoz v. MacMillan, supra,* 195 Cal.App.4th at p. 657.) The court acknowledged the tenant could not sue the landlord for the tort of wrongful eviction because the eviction had been obtained through the judicial process. (*Id.* at p. 655.) It noted, however, that "a tenant may bring a breach

of contract action if the landlord denies the tenant use of the real property described in the lease for the period of time specified in the lease. [Citation.] And the tenant's rights under the lease do not disappear merely because the landlord initiates an unlawful detainer action . . . ." (*Id.* at p. 656.) The court concluded, "A landlord can breach a lease by evicting a tenant using judicial processes when the unlawful detainer judgment relied on for the writ of possession is later reversed." (*Id.* at p. 659.) The court concluded: "Here, there is a triable issue of fact as to whether MacMillan breached the lease by actually *enforcing* the initial unlawful detainer judgment and evicting Munoz. If Munoz has suffered damages as a result of the alleged breach, she can pursue applicable remedies for breach of contract." (*Ibid.*, fn. omitted.)

Kagan asserts the instant case is legally indistinguishable from *Munoz*, and indeed, the procedural postures of the two cases are quite similar. Zablen complains Kagan did not cite *Munoz* in opposition to the motion for summary judgment, and consequently argues this court should not consider it on appeal.[1] He posits that review of a summary judgment is limited to those facts and theories before the trial court, and contends "arguments, theories, and factual allegations not made in the trial court are waived and cannot be raised for the first time on appeal under principles of forfeiture/waiver and 'theory of the trial.'" (*DiCola v. White Bros. Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 677; *Havstad v. Fidelity Nat. Title Ins. Co.* (1997) 58 Cal.App.4th 654, 661; *North Coast Business Park v. Nielsen Constr. Co.* (1993) 17 Cal.App.4th 23, 28-29.) However, the cited cases fail to acknowledge the well-established exception to the stated rule, as explained in *Ward v. Taggart* (1959) 51 Cal.2d 736, 742: although an appellant's theory of recovery was not advanced in the trial court, "a change in theory is permitted on appeal when 'a question of law only is presented on the facts appearing in the record. . . .'

[1] Zablen also maintains that *Munoz* has no application to the instant case. He explains, "*Munoz* involved a forcible eviction, where the tenant was dispossessed under a writ of possession enforced by law enforcement officials. [Citation.] Here, in contrast, Kagan vacated the property." Kagan answers that he did not depart voluntary, but pursuant to a writ of possession. Because the issue is disputed, resolution of the matter is not amenable to summary adjudication.

[Citations.]" Thus, "on appeal a party may change the legal theory he relied upon at trial, so long as the new theory presents a question of law to be applied to undisputed facts in the record. [Citations.]" (*Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 15-16; accord, *Wagner v. City of South Pasadena* (2000) 78 Cal.App.4th 943, 949 ["appellants' notice-service argument was not raised before the trial court, but we addressed it on appeal since it involves an interpretation of law based on undisputed facts"]; *Johanson Transportation Service v. Rich Pik'd Rite, Inc.* (1985) 164 Cal.App.3d 583, 588 ["an argument or theory will generally not be considered if raised for the first time on appeal, unless the question is one of law to be applied to undisputed fact"].)

As explained above, the following facts are not disputed: The parties entered into a written Lease, pursuant to which Kagan was entitled to possession of the Premises for an initial term of five years; during the term of the Lease, Zablen obtained a judgment and a writ of possession from the superior court ordering Kagan to vacate the premises; Kagan vacated the premises; and Zablen's judgment was reversed on appeal. These facts, together with Kagan's allegation he was damaged by Zablen's conduct, state a cause of action for breach of contract and breach of the covenant of quiet enjoyment. (*Munoz v. MacMillan,* 195 Cal.App.4th at p. 659.) As the *Munoz* court concluded: "Here, there is a triable issue of fact as to whether [landlord] breached the lease by actually *enforcing* the initial unlawful detainer judgment and evicting [tenant]. If [tenant] has suffered damages as a result of the alleged breach, [he] can pursue applicable remedies for breach of contract." (*Ibid.*, fn. omitted.) Consequently, we reverse the summary judgment in favor of Zablen.

2. Cause of action for interference with advantageous business relations

Kagan sued Zablen's nephew, Marshall Zablen, for intentional interference with advantageous business relations based on Marshall's advice to Zablen to evict Kagan due to the Chabad sublease. The trial court ruled the cause of action was barred by the

litigation privilege and sustained Zablen's demurrer. Kagan challenges that ruling on appeal.

"In determining whether plaintiffs properly stated a claim for relief, our standard of review is clear: '"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.]'" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) "We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. [Citation.]" (*Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 631.)

As Kagan acknowledges, a cause of action for intentional interference with prospective economic advantage contains five elements: "'"(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of defendant." [Citations.]' [Citation.]" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.) "[A] plaintiff . . . must plead and prove as part of its case-in-chief that the defendant's conduct was 'wrongful by some legal measure other than the fact of interference itself.' [Citation.]" (*Id.* at p. 1153.) "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Id.* at p. 1159, fn. omitted.)

Here, Kagan alleged Marshall "encouraged [Zablen] to sell the premises at full market value free of the Lease . . . ." Kagan further alleged Marshall "wrongfully conceived a plan" to do so and gave Zablen erroneous legal advice upon which he relied. Thus, the complaint simply alleged that Marshall's conduct was wrongful because it interfered with Kagan's ability to continue his possession of the Premises under the

favorable terms of the Lease, not because it contravened any law, regulation, or other legal standard. Because Kagan does not allege any wrongful conduct, independent of the interference itself, the trial court properly sustained the demurrer to this cause of action.

3. Attorney fees award

The trial court awarded Zablen $165,440.50 in attorney fees and costs. Because we reverse the judgment, Zablen is not entitled to such fees as the prevailing party under the Lease. We therefore reverse the attorney fees award.

III. DISPOSITION

The judgment entered pursuant to the order granting summary judgment is reversed as is the order awarding attorney fees. The order sustaining the demurrer is affirmed. The parties are to bear their own costs on appeal.

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KUMAR, J.*

We concur:

TURNER, P. J.

MOSK, J.

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