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Court of Appeal, Fourth District, Division 2, California.

Sam DASON, Plaintiff and Appellant,
v.
Robert ARRIETA et al., Defendants and Respondents.

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APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge. Affirmed. (Super. Ct. No. CIVDS1514396)

Attorneys and Law Firms

Javier Garibay for Plaintiff and Appellant.

Best Best & Krieger, Piero C. Dallarda, and Thomas M. O'Connell for Defendants and Respondents.

OPINION

CODRINGTON, J.

I. INTRODUCTION

***1** Plaintiff and appellant Sam Dason brought suit against defendants and respondents Robert Arrieta and Brian West, among others, alleging fraud and conspiracy to commit fraud in connection with his 2006 purchase of two condominiums in a development in Mexico. Dason appeals from the judgment entered in favor of Arrieta and West after the trial court sustained their demurrer to Dason's operative first amended complaint (FAC) without leave to amend. We find no error, and affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

Dason brought suit on October 1, 2015. He filed the FAC on February 3, 2016, after Arrieta and West's demurrer to the initial complaint was sustained with leave to amend. In the FAC, Dason alleges that in February 2006, he entered into contracts to purchase two residential units in a development consisting of three "towers" of condos being built in San Felipe, Mexico, by a Mexican corporation, defendant Inversiones Soblar, S.A. DE C.V. (Soblar). The total purchase price of the two units—one a "Penthouse" unit, the other a less expensive "Dolphin" unit—was $1,081,530, and Dason made down payments to Soblar totaling $314,432. [1] Dason alleges that in January 2006 several Soblar employees, defendants Mike McClaughlin and Eric Garcia had told him, among other things, that the company had collected sufficient funding through down payments to guarantee

construction would be completed on all three towers of the development within two years. But the contract Dason entered into with Soblar projected that his units would be constructed and delivered to him by the end of December 2006.

Construction of Dason's units was not completed by December 2006, or even within two years of January 2006, and the projected date of completion was repeatedly pushed back. Dason alleges in the FAC that a 2009 email from Garcia promised Dason's units would be completed in late 2010. In 2010, Dason met in person with Arrieta and West, who represented that "they were the new owners of the project and that the construction will be completed 'soon.' " But on the same day, West "represented to [Dason] that in 3 or 4 years all the towers will be completed."

Dason alleges in the FAC that he had further communications with McClaughlin and Garcia over the next several years. When Dason met with them in person in 2011, they "made many excuses why the towers had not been built...." They represented, however, that the " 'Penthouses had appreciated to double the price [Dason] paid,' " and that the project was "so successful and such a guaranteed money maker" that defendant Laura Ballegeer, the Soblar employee who had signed Dason's purchase agreement, had personally purchased a condo and a penthouse. In 2012, Garcia allegedly urged Dason to purchase another unit, again representing that the prices for the units had doubled in comparison to what Dason had paid in 2006. And on an unspecified date "[l]ater in 2012," Garcia "represented in person to [Dason] that Towers II and III will be completed in three to five years." Dason also alleges that in 2013, he met again in person with Garcia, who "represented that [Dason] could not sell his contracts at the current greatly appreciated price, nor could he combine the down payments and apply them to a finished unit that was then available."

***2** Dason's next alleged communication with Arrieta and West was not until 2015. The FAC refers to an email dated August 13, 2015, from West to Dason, which indicates Dason's units still were not complete. This email, which Dason attached to his initial complaint, but not the FAC, offers a "trade" of the Penthouse unit purchased by Dason for another unit, which had already been completed and furnished, with an option for Dason to exchange it for the Penthouse unit once it was complete. The FAC alleges another email from West to Dason—dated August 21, 2015, which was not attached to either the initial complaint or the FAC—in which West rejected a similar trade with respect to the other unit purchased by Dason, and in which West "disclos[ed] the concealed fact that it was in 2008 he and his partners purchased the project...."

As of May 18, 2016, the date of the hearing on Arrieta and West's demurrer to the FAC, they were the only defendants to have been served. The trial court sustained the demurrer, and on June 9, 2016, it entered a judgment of dismissal in favor of Arrieta and West. The register of actions indicates that on July 18, 2016, the trial court dismissed without prejudice the remainder of the lawsuit for lack of prosecution.

III. DISCUSSION

Dason argues in the alternative that the FAC adequately pleaded a cause of action for fraud against Arrieta and West, or that it could be amended to do so. For the reasons discussed below, we reject both arguments.

A. Standard of Review.

In reviewing a ruling on a demurrer, this court "independently evaluate[s] the complaint, construing it liberally, giving it a reasonable interpretation, reading it as a whole, and viewing its parts in context." (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 486.) We treat " 'the demurrer as admitting all material facts properly pleaded....' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) But we "may not consider conclusions of fact or law, opinions, speculation, or allegations which are contrary either to law or to judicially noticed facts." (*Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1024.)

The denial of leave to amend is reviewed for abuse of discretion. (*Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 743.) "To show abuse of discretion, plaintiff must show in what manner the complaint could be amended and how the amendment would change the legal effect of the complaint, i.e., state a cause of action." (*Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 992.)

B. Analysis.

1. Pleading Requirements for Fraud Claims.

"The elements which must be pleaded to plead a fraud claim are '(a) misrepresentation (false representation, concealment or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' [Citation.]" (*Agricultural Ins. Co. v. Superior Court* (1999) 70 Cal.App.4th 385, 402.) Claims for fraud must be pleaded with specificity; the purpose of the specific pleading requirement is to give notice to the defendant and to furnish him or her with definite charges. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216, superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.)

Pleading the legal conclusion of fraud is insufficient; rather, "[e]very element of the cause of action for fraud must be alleged in the proper manner (i.e. factually and specifically), and the policy of liberal construction of pleadings ... will not ordinarily be invoked to sustain a pleading defective in any material respect.' " (*Committee on Children's Television, Inc. v. General Foods Corp., supra*, 35 Cal.3d at p. 216.) " ' "This particularity requirement necessitates pleading *facts* which 'show how, when, where, to whom, and by what means the representations were tendered.' " ' " (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993.) Similarly, "the mere assertion of 'reliance' is insufficient. The plaintiff must allege the specifics of his or her reliance on the misrepresentation to show a bona fide claim of actual reliance." (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.)

***3** The limitations period for a fraud cause of action is three years from accrual. (Code Civ. Proc., § 338, subd. (d).) However, "[t]he cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud...." (*Ibid.*) "This discovery element has been interpreted to mean 'the discovery by the aggrieved party of the fraud *or* facts that would lead a reasonably prudent person to *suspect* fraud." (*Doe v. Roman Catholic Bishop of Sacramento* (2010) 189 Cal.App.4th 1423, 1430.)

" 'In order to rely on the discovery rule for delayed accrual of a cause of action, "[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence." [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to "show diligence"; "conclusory allegations will not withstand demurrer." [Citation.]' " (*Doe v. Roman Catholic Bishop of Sacramento, supra*, 189 Cal.App.4th at p. 1430.)

2. The FAC Does Not State Sufficient Facts to Support a Cause of Action for Fraud Against Arrieta and West.

The gravamen of Dason's fraud claim, as alleged in the FAC, is that in 2006 he was induced to purchase the two condominium units and to make down payments on those purchases by fraudulent misrepresentations. Nevertheless, the only representations —whether false or not—specifically alleged in the FAC to have been made by Arrieta or West, as opposed to other defendants, date to 2010 at the earliest. On its face, therefore, Dason's fraud claims against Arrieta and West fail, because he could not have relied on representations made in 2010 to enter into contracts for purchase of the two condominium units in 2006, and actual reliance is an essential element. (See *Cadlo v. Owens-Illinois, Inc., supra*, 125 Cal.App.4th at p. 519.)

Furthermore, the FAC is devoid of any allegations of fact supporting the notion that Arrieta or West might be responsible for the 2006 misrepresentations that induced Dason to purchase the two units from Soblar. It is alleged that Arrieta and West are "individual[s] doing business in and residing in San Bernardino County, California. It is further alleged that in 2010, Arrieta and West introduced themselves to Dason as the "new owners of the project," but an August 2015 email revealed to Dason that they in fact had owned the project since 2008. These alleged facts are insufficient to establish that Arrieta and West are liable for any misrepresentations Soblar or its employees may have made in 2006.

3. Leave to Amend Was Properly Denied.

On appeal, Dason argues that the FAC could be amended to add allegations showing that Arrieta and West were responsible for the 2006 misrepresentations that induced him to purchase the condominiums from Soblar. Among other things, Dason proposes that the "circumstances present too strong of a coincidence not to conclude that there is a high likelihood that [Arrieta] and West have been part of a conspiracy to defraud [Dason] from the time of the execution of the sales contract in February 2006, very likely as shareholders/owners of [Soblar]."

Nevertheless, even if Dason could amend his pleadings to allege specific facts showing Arrieta and West to be liable for the alleged 2006 misrepresentations, he has failed to demonstrate that he can allege specific facts showing that the discovery rule applies and he filed suit within three years of when a reasonably prudent person would have suspected fraud. (*Doe v. Roman Catholic Bishop of Sacramento, supra*, 189 Cal.App.4th at p. 1430.) Because Dason's complaint was filed October 1, 2015, he needs to plead specific facts showing that his fraud claims did not accrue until after October 1, 2012.

***4** In the FAC, Dason asserts that "reasons and excuses" for the delay in construction offered to him by Garcia on an unspecified date in 2012 "make it *certain* that the representations made in 2006 ... were false." (Italics added.) Nothing in the FAC, and nothing in Dason's briefing on appeal, shows that these "reasons and excuses" for the delay made in 2012 were so different from the "many excuses why the towers had not been built" offered to Dason by McClaughlin and Garcia in 2011 that a reasonably prudent person would not at least have suspected fraud in 2011. Indeed, there is a strong argument to be made that the specific facts pleaded show a reasonably prudent person would have suspected fraud by 2010: Garcia stated in 2009 that the units would be completed in late 2010—approximately four years after the date set by contract—but when 2010 came, "new owners" of the project introduced themselves and estimated that it would be 3 or 4 more years until the towers would be completed.

We conclude that Dason has failed to meet his burden of showing that he could plead specific facts demonstrating that his claims accrued after October 1, 2012, and therefore within the three-year statute of limitations period. (See *Buller v. Sutter Health, supra*, 160 Cal.App.4th at p. 992.) He has therefore failed to show that the trial court abused its discretion by denying him further leave to amend.

IV. DISPOSITION

The judgment is affirmed. Arrieta and West are awarded their costs on appeal.

We concur:

MCKINSTER, Acting P. J.

MILLER, J.

All Citations

Not Reported in Cal.Rptr., 2018 WL 3198744

Footnotes

1 We recite here the total amounts alleged in the FAC. These amounts do not quite match with the FAC's allegations regarding the individual purchase prices or the down payment amounts for the two units, and an examination of purchase documents that were attached to the complaint (but not the FAC) also yields slightly different results. But the differences are not material to the present discussion.

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