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Court of Appeal, Fifth District, California.

NORTH SEA FOODS, INC., et al., Plaintiffs and Appellants,
v.
REAL EQUITY INVESTMENT GROUP IV, et al., Defendants and Respondents.

No. F051571.
|
(Super.Ct.No. 346173).
|
April 25, 2008.

APPEAL from a judgment and orders of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

**Attorneys and Law Firms**

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**OPINION**

LEVY, J.

***1** Appellant, North Sea Foods, Inc. (NSF), leased a portion of a warehouse from respondent, CFM Partnership (CFM), for the purpose of operating a food processing business. Appellant, Peter Parineh aka Pooroushasb Parineh, signed the lease as the owner of NSF and as the guarantor. Although NSF took the building "as is," CFM agreed to maintain the roof, exterior walls, and sprinkler system. However, the roof leaked and the fire safety systems were inadequate. As a result, NSF could not obtain proper permits for the building. CFM eventually went into receivership and sold the property to respondent, Real Equity Investment Group IV, LLC (REI).

Appellants filed the underlying complaint for damages alleging that, due to respondents' breach of the lease, the building could not be permanently occupied and was therefore unsuitable for appellants' purposes. Following a series of demurrers, appellants filed their fourth amended complaint. Respondents again demurred. This time, the trial court sustained the demurrers without leave to amend.

Although the fourth amended complaint included 47 causes of action, appellants are pursuing only 15. Appellants argue that these 15 causes of action either adequately stated a claim or can be cured by amendment. Therefore, appellants contend, the trial court abused its discretion in denying leave to amend.

As discussed below, the trial court correctly sustained demurrers without leave to amend to certain causes of action but erred in sustaining the demurrers without leave to amend to others. Accordingly, the judgment of dismissal will be reversed in part and affirmed in part.

**BACKGROUND**

CFM owned an approximately 272,000 square foot warehouse located in Turlock. In April, 1998, CFM leased approximately 18,860 square feet of "PROCESSING, COOLER, AND OFFICE SPACE" within this warehouse to NSF. The lease referred to the warehouse as the "Building" and the leased portion as the "Premises." Parineh, NSF's owner, guaranteed the lease as "PETER PARINEH OF AUSTIAJ LIMITED PARTNERSHIP." Delta Management Group, Inc., through respondent Michael Leith, represented CFM as its real estate broker.

The lease specifically imposed certain duties of maintenance and repair on CFM. CFM was required to keep the Building's foundations, exterior walls, exterior roof and fire sprinkler system "in good order, condition and repair."

Through a lease addendum, NSF agreed to accept "the Premises in [its] current As-Is condition." In exchange, NSF received rent reductions and the ability to cancel the lease by December 31, 1999. This addendum designated "North Sea Foods / Austiaj Limited Partnership / Khashayar Investment, Inc." as the lessee. However, only NSF, through Parineh as owner, signed the document.

NSF made improvements to the Premises to prepare it for its intended use, i.e., a food processing business. Nevertheless, NSF was not able to obtain a temporary occupancy permit until 2000 because the Building did not comply with city building, fire and safety codes. The temporary occupancy permit and a permanent occupancy permit were conditioned upon CFM's compliance with these codes. CFM was required to make extensive improvements to the Building including roof repairs and the "Master Life Safety Plan and Life Safety Corridor." However, none of the code violations were corrected while CFM operated the Building. As a result, NSF was able to use the Premises for only a brief period of time. Moreover, leaks in the Building's roof caused damage to the Premises and to NSF's equipment and operations.

***2** In March 2002, CFM declared bankruptcy. Respondent, Harry B. Crockett, was appointed as receiver of CFM and the Building. As the receiver, Crockett operated the Building until October 31, 2003, when the Building was sold to REI. During this time, both the building permits and NSF's temporary occupancy permit expired. Moreover, the Building still was not in compliance with the city building, fire, and safety codes. Accordingly, NSF was not able to obtain a new temporary occupancy permit. Further, due to the continuing leaks in the Building's roof, a portion of the roof over the Premises caved in.

In December 2003, REI, the new owner of the Building, filed an unlawful detainer action against NSF and Parineh. Following a court trial, judgment was entered in favor of REI on March 2, 2004.

On March 22, 2004, appellants filed their initial complaint against REI, CFM and Crockett setting forth causes of action based on alleged breaches of the lease and fraud. REI and CFM answered the complaint. However, Crockett demurred on the ground that appellants had not obtained permission to sue him. Crockett's demurrer was eventually sustained and appellants filed the first amended complaint.

The first amended complaint added Leith and Delta Management Group as defendants. This time, all of the defendants demurred. REI's demurrer was sustained with leave to amend.

The second amended complaint was filed and again demurred to. Appellants did not oppose the demurrers but requested leave to amend. Accordingly, the trial court sustained the demurrers as unopposed and granted leave to amend.

As before, the defendants responded to the third amended complaint with demurrers. Appellants opposed these demurrers but, because of numerous procedural violations, the trial court refused to consider the opposition papers and sustained the demurrers in their entirety on that ground. However, the trial court again granted leave to amend.

The fourth amended complaint is the pleading at issue in this appeal. This time, the demurrers were sustained in their entirety without leave to amend. The trial court thereafter awarded REI approximately $87,000 in attorney fees and CFM and Crockett approximately $107,000 in attorney fees as the prevailing parties.

With each successive amendment, appellants added causes of action. Thus, the counts grew from 11 in the complaint to 47 in the fourth amended complaint. Nevertheless, appellants are pursuing only the following 15 causes of action on appeal alleging breach of contract, breach of the covenant of good faith and fair dealing, and fraud: 1, 5, 9, 10, 12, 16, 20, 21, 25, 30, 38, 42, 43, 45, and 46. Appellants are also deleting Khashayar Investment, Inc. as a plaintiff.

## DISCUSSION

**1. *Standard of review.***

In reviewing a ruling on a demurrer, the appellate court's only task is to determine whether the complaint states a cause of action. (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 824.) In doing so, the court treats the

  

demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Further, the complaint must be given a reasonable interpretation, reading it as a whole and its parts in their context. (*Ibid.*) The complaint's allegations must be liberally construed with a view to attaining substantial justice among the parties. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

***3** When a demurrer is sustained without leave to amend, the appellate court must decide whether there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.) If so, the trial court abused its discretion and the judgment will be reversed. (*Ibid.*) However, the burden is on the appellants to show the manner in which the complaint can be amended and how the amendment will cure the defect. (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 161.) This showing may be made for the first time on appeal. (*Id.* at p. 163.)

**2. *The demurrers to the entire complaint.***

Respondents demurred to the entire complaint based primarily on the claim that the various appellants lacked standing to sue. Since the alleged causes of action arose out of a landlord-tenant relationship and NSF was the only lessee, respondents argued that the remaining appellants were improper plaintiffs. With respect to NSF, respondents asserted that the complaint was uncertain because it inconsistently alleged that NSF was suing on its own behalf and that Parineh was suing as NSF's successor in interest. REI further demurred on the ground that appellants' allegation that they had been constructively evicted from the Premises before REI obtained an interest in the Building prevented appellants from establishing a landlord-tenant relationship with REI.[1]

[1] On appeal, REI is not pursuing its demurrers based on there being another action pending between the parties relating to the same subject matter.

**a. *Plaintiffs who did not execute the lease.***

The lease named CFM as the lessor and NSF as the lessee. No other parties were identified in those capacities. The fourth amended complaint similarly identifies NSF as the lessee.

An addendum to the lease lists "North Sea Foods / Austiaj Limited Partnership / Khashayar Investment, Inc." as lessee. However, the addendum is signed only by NSF, through Parineh as owner.

All causes of action being pursued by appellants arise out of either alleged breaches of the lease or misrepresentations by the lessors regarding the condition of the Premises. Thus, the alleged causes of action are based on the contractual landlord-tenant relationship between the parties. However, someone who is not a party to a contract has no standing to enforce it or to recover damages for its breach. (*Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1722.) Accordingly, unless Parineh, in his individual capacity, and Austiaj are parties to the lease, they do not have standing to bring this action.

Parineh, individually, is not identified as a lessee in the lease, addendum, or complaint. Although Parineh guaranteed the lease, none of the current causes of action relate to that guarantee. Thus, Parineh, in his individual capacity, lacks standing to sue. Therefore, the demurrers to all causes of action against respondents brought by Parineh as an individual were properly sustained without leave to amend. (Cf. *American Home Ins. Co. v. Travelers Indemnity Co.* (1981) 122 Cal.App.3d 951, 968.)

***4** Similarly, Austiaj is not identified as a lessee in the lease. Nevertheless, the lease addendum refers to NSF and Austiaj as lessee. Appellants contend that because Austiaj is expressly named as a lessee in the addendum, at least a nominal landlord-tenant relationship was established. However, Austiaj did not execute this addendum. Rather, the addendum is executed only by NSF and CFM. Further, while Austiaj is related to NSF through Parineh, there is absolutely no indication that the parties to the lease intended that Austiaj become a lessee and therefore be bound by the lease. Rather, NSF was the tenant. Accordingly, Austiaj also lacks standing and the demurrers to all causes of action brought by Austiaj were properly sustained without leave to amend.

**b. *Causes of action against Leith.***

As noted above, Leith represented CFM in the lease transaction as its real estate broker. Leith signed the lease as the broker, but not as a lessor. Rather, the Premises were leased by CFM to NSF. Nevertheless, the fourth amended complaint includes Leith as a defendant in causes of action arising out of the lease, i.e., breach of

contract and breach of the covenant of good faith and fair dealing. However, since Leith did not convey the interest in the Premises, i.e., he was not in privity of contract with appellants, Leith is not a proper defendant to these causes of action. (Cf. *Vallely Investments v. BancAmerica Commercial Corp.* (2001) 88 Cal.App.4th 816, 822.)

Appellants contend Leith's status as a landlord is a question of fact because the fourth amended complaint alleges that Leith was an owner of the property from April 30, 1998, through March 1, 2002. However, this allegation is inconsistent with the allegation that CFM "was *the* owner" (italics added) of the subject real property from "prior to April 30, 1998 until on or about March 1, 2002." It is permissible to plead inconsistent *theories* of recovery. (*Gentry v. eBay, Inc., supra,* 99 Cal.App.4th at p. 827.) Nevertheless, " 'a pleader cannot blow hot and cold as to the *facts* positively stated.' " (*Id.* at pp. 827-828.) Unlike the allegation that CFM was the owner of the Building, this bare allegation of Leith's ownership is not supported by the lease or any other pleadings filed in this action. Accordingly, the factual allegation that CFM was the owner of the Building controls.

Appellants also argue that the fourth amended complaint's allegation that each defendant was the agent of each of the remaining defendants causes Leith to be liable under Civil Code section 2343. However, this section only makes an agent liable for affirmative misfeasance. It does not render an agent liable to third parties for the failure to perform duties owed to the principal. (*Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 65.) The fourth amended complaint does not allege any specific acts of affirmative misfeasance with respect to the breach of contract and breach of the covenant of good faith and fair dealing causes of action. Thus, Leith cannot be found liable for the acts of the landlords, i.e., CFM and REI, as their agent.

***5** In sum, because Leith was not a party to the lease, appellants cannot allege a cause of action against him for either breach of contract or breach of the covenant of good faith and fair dealing. Therefore, the trial court properly sustained the demurrers to those causes of action as they pertain to Leith.[2]

[2] The remaining causes of action alleged against Leith are for fraud. As discussed below, the trial court properly sustained the demurrers to the fraud causes of action without leave to amend.

***c. REI's demurrer based on appellants' constructive eviction claim.***

REI contends appellants cannot state a cause of action against it arising out of the lease because appellants cannot establish that a landlord-tenant relationship ever existed between REI and NSF. REI bases this argument on the fact that appellants' complaint alleged they had been constructively evicted from, and had vacated, the Premises in early 2001. According to REI, appellants' constructive eviction allegations are binding and establish that appellants ended any landlord-tenant relationship they had before REI purchased the Building on October 31, 2003.

A constructive eviction occurs if the landlord engages in acts that render the premises unfit for occupancy for the purpose for which it was leased, or deprive the tenant of the beneficial enjoyment of the premises. (*Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141, 1152.) Failure to repair and keep the premises in a suitable condition can constitute constructive eviction. (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 926.) However, to invoke a constructive eviction defense or remedy, the aggrieved tenant must surrender or vacate the premises within a reasonable time after the landlord's material interference with the lease. (*Cunningham v. Universal Underwriters, supra,* 98 Cal.App.4th at p. 1153.) If the tenant does so, the tenant is relieved of its obligation to pay rent accruing as of the date of the surrender. (*Petroleum Collections Inc. v. Swords* (1975) 48 Cal.App.3d 841, 847.) If the tenant does not move out of the premises, the landlord's interference with the tenant's quiet enjoyment may nevertheless support an action for damages. (*Cunningham v. Universal Underwriters, supra,* 98 Cal.App.4th at pp. 1152-1153.)

In addition to alleging that they were constructively evicted from the Premises in early 2001, the fourth amended complaint also alleges that appellants were constructively evicted after October 31, 2003. Moreover, appellants alternatively allege that REI breached the covenant of quiet enjoyment, a claim that does not relieve the tenant of the obligations under the lease.

A plaintiff is free to allege any and all inconsistent counts, i.e., alternative factual or legal theories, when the pleader is in doubt as to which theory most accurately reflects the events and can be established by the evidence. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 691.) This is what appellants have done in the fourth amended complaint. Under these circumstances, appellants' constructive eviction claim does not require a determination that no landlord-tenant relationship existed between NSF and REI. In fact, REI's successful action for unlawful detainer

  

and receipt of a judgment against NSF for past due rent and holdover damages is a clear indication that NSF did not elect to surrender the premises and terminate its landlord-tenant relationship before REI purchased the Building. Accordingly, the trial court erred in sustaining REI's demurrer based on the absence of a landlord-tenant relationship.

**d.** ***NSF suing on its own and through Parineh as successor in interest.***

***6** The plaintiffs in the fourth amended complaint include NSF, as a dissolved corporation suing pursuant to Corporations Code section 2010, and Parineh as NSF's successor in interest. Respondents demurred on the ground that these plaintiffs were inconsistent and thus caused the complaint to be uncertain regarding each cause of action alleged by NSF. Respondents do not dispute that NSF, either as a dissolved corporation or through its successor in interest, has standing to prosecute this action. Respondents' objection is that appellants did not select one plaintiff to proceed.

A complaint is only required to set forth the essential facts of the plaintiff's case with reasonable precision and sufficient particularity to acquaint the defendant with the nature, source and extent of the cause of action. (*Ribas v. Clark* (1985) 38 Cal.3d 355, 358, fn. 1.) Thus, a demurrer for uncertainty will not lie as to even uncertain and ambiguous allegations if they are with respect to inconsequential matters. (*Gressley v. Williams* (1961) 193 Cal.App.2d 636, 643.) The demurrer should be overruled where the complaint's allegations are sufficiently clear to apprise the defendant of the issues to be met. (*Ibid.*)

Here, whether NSF is suing as a dissolved corporation or through Parineh as its successor in interest is of no consequence to respondents. The manner in which NSF sues does not affect the nature, source and extent of each cause of action or respondents' liability, if any. Respondents do not contend otherwise. Accordingly, the trial court erred in sustaining the demurrer to the fourth amended complaint as uncertain on this ground.

**3.** ***The demurrers to specific causes of action.***

As noted above, appellants have limited the causes of action they are pursuing to the claims for breach of contract, breach of the covenant of good faith and fair dealing, and fraud. Accordingly, the sustaining of the demurrers to the causes of action for negligence, nuisance, constructive eviction, quantum meruit, violation of Civil Code section 1708, interference with economic advantage, wrongful eviction, forcible entry and detainer, and retaliatory eviction will be affirmed.

**a.** ***Breach of contract.***

**i.** ***Causes of action against CFM, Crockett and Leith (1, 9, 12, 20, 45).***

CFM and Crockett demurred to the first and twelfth causes of action for breach of contract on the grounds that appellants included improper allegations concerning oral promises and a settlement agreement. CFM and Crockett note that the written lease can only be modified in writing and that a copy of the settlement agreement was not attached to the complaint.

However, these causes of action also include the necessary elements of a breach of contract claim, i.e., (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) The fourth amended complaint attaches and incorporates the lease. The first and twelfth causes of action allege that NSF performed its obligations under the lease, that respondents breached their obligations to keep the roof and safety systems in good order and repair, and that, as a result, NSF sustained damages. The existence of irrelevant facts does not justify sustaining the demurrer. (*State of California ex rel. Bowen v. Bank of America Corp.* (2005) 126 Cal.App.4th 225, 240.) Accordingly, the trial court erred in sustaining the demurrers to the first and twelfth causes of action.

***7** CFM, Crockett and Leith demurred to the ninth cause of action on the ground that Leith was not a proper defendant. As discussed above, this was correct. Thus, the sustaining of the demurrer to the ninth cause of action as to Leith only will be affirmed.

CFM, Crockett and Leith did not demur specifically to the twentieth and forty-fifth causes of action. Since CFM and Crockett's demurrer to the entire complaint on the ground of uncertainty was improperly sustained, NSF may pursue CFM and Crockett on these causes of action.

  

**ii.** ***Causes of action against REI (30, 42, 46).***

REI demurred to the thirtieth cause of action on the ground that NSF included allegations regarding certain oral promises. As discussed above, the demurrer should not have been sustained on this ground.

REI also argued that the thirtieth, forty-second and forty-sixth causes of action were barred by the doctrine of collateral estoppel. According to REI, the unlawful detainer action established that NSF had not performed all lease conditions in that it defaulted on rent and that it had taken the Premises "as is." REI contends NSF could have raised the condition of the property as an excuse for the nonpayment of rent in the unlawful detainer action and thus cannot now allege that such condition constituted a breach of the lease.

"Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.]" (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn. omitted.) Traditionally, the doctrine is applied only if the following threshold requirements are fulfilled: (1) The issue sought to be precluded must be identical to that decided in a former proceeding; (2) this issue must have been actually litigated in the former proceeding; (3) the issue must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (*Ibid.*)

Here, contrary to REI's position, the issue of whether the condition of the building constituted a breach of the lease and excused NSF's nonpayment of rent was not litigated in the unlawful detainer proceeding. The sole issue before the court in an unlawful detainer action is the right to possession. (*E.S. Bills, Inc. v. Tzucanow* (1985) 38 Cal.3d 824, 830.) In the context of a commercial lease, the one thing the lessee cannot do is to remain in possession of the premises without paying rent, await the lessor's filing of an unlawful detainer action and then set up the claim of damages for the lessor's breach of covenant as a defense to the unlawful detainer. (*Schulman v. Vera* (1980) 108 Cal.App.3d 552, 558.) Thus, NSF is not precluded from arguing that REI breached its promise to keep the Building's foundations, exterior walls, exterior roof and fire sprinkler system "in good order, condition and repair ." The effect of NSF's agreement to take the Premises "as is" was also not decided in the former proceeding.

***8** Moreover, in the unlawful detainer action REI took the position that NSF could not argue that the condition of the Building, specifically the roof, relieved NSF of its obligation to pay rent. Thus, REI is estopped from asserting a contrary position now. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.)

Further, the covenant to pay rent is independent. (*Fairchild v.. Park* (2001) 90 Cal.App.4th 919, 928.) Thus, NSF's default on rent did not relieve REI from performing its covenant to keep the Building's roof in good condition and repair.

Therefore, the trial court erred in sustaining REI's demurrers to the thirtieth, forty-second and forty-sixth causes of action.

**b.** ***Breach of the covenant of good faith and fair dealing.***

The implied duty of good faith and fair dealing exists in virtually every commercial lease. (*Ocean Services Corp. v. Ventura Port Dist.* (1993) 15 Cal.App.4th 1762, 1780.) This covenant of good faith and fair dealing requires that neither party do anything that will injure the right of the other to receive the benefits of the agreement. (*Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 589.) Put another way, the covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose. (*Ibid.*) In the context of a commercial lease, there is a duty on the part of a landlord to promote the continued occupancy of the premises by an existing tenant. (*Ocean Services Corp. v. Ventura Port Dist., supra*, 15 Cal.App.4th at p. 1780.)

**i.** ***Causes of action against CFM, Crockett and Leith (10, 21) .***

The tenth and twenty-first causes of action incorporated by reference most of the introductory paragraphs in the complaint. These paragraphs including statements that the lessor was obligated to maintain and repair the roof and fire safety system, the lessor failed to satisfy these obligations, and, as a result, plaintiff was unable to use the lease premises to operate the business. Based on this incorporation, appellants alleged that each of the defendants "breached their Covenant of Good Faith and Fair Dealing. Each breach was the actual and proximate cause of damage to Plaintiff in an amount according to proof at trial." CFM, Crockett and Leith demurred on the

  

grounds that theses causes of action were uncertain and that Leith, named as a defendant in the tenth cause of action, was not a party to the lease.

As discussed above, Leith was not a party to the lease. Thus, the demurrer to the tenth cause of action was properly sustained as to Leith.

Appellants' inclusion of paragraphs by reference followed by the conclusion that defendants breached the covenant of good faith and fair dealing as to the unspecified "plaintiff" is not a model of pleading. Nevertheless, facts contained in the incorporated paragraphs, when deemed to be true, support a cause of action for breach of the covenant of good faith and fair dealing.

***9** As explained by appellants, the lease states that the parties contracted for the use of the premises as a fish reprocessing facility. However, appellants were not able to accomplish this purpose due to CFM and Crockett's failure to keep the building in usable condition by repairing the roof and providing a fire safety system as they were obligated to do under the lease. In other words, the complaint alleges that CFM and Crockett, as landlords, did not do everything the lease presupposed they would do to accomplish its purpose.

Accordingly, the trial court erred in sustaining the demurrers to the tenth and twenty-first causes of action without leave to amend. On remand, the complaint can be amended to restate the pertinent facts and thereby better apprise CFM and Crockett of the basis for the breach of the covenant of good faith and fair dealing causes of action against them.

***ii. Cause of action against REI (43).***

REI's demurrer to the breach of the covenant of good faith and fair dealing cause of action alleged against it was on the same collateral estoppel grounds as its demurrer to the breach of contract causes of action, i.e., the unlawful detainer action established that appellants had not performed all lease conditions on their part to have been performed. As discussed above, appellants' contract based causes of action are not precluded by the collateral estoppel doctrine. Accordingly, the demurrer to the forty-third cause of action should not have been sustained.

***c. Fraud causes of action (5, 16, 38).***

The elements required to plead a fraud claim are (1) misrepresentation (false representation, concealment or nondisclosure); (2) knowledge of falsity; (3) intent to defraud, i.e ., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 363.) Unlike other causes of action, fraud must be pled specifically. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) General and conclusory allegations do not suffice. (*Ibid.*) Thus, the plaintiff must allege *facts* that show " ' "how, when, where, to whom, and by what means the representations were tendered." ' " (*Ibid.*) The plaintiff must also plead "the 'detriment proximately caused' by the defendant's tortious conduct." (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818.) This specificity requirement allows the defendant to understand fully the nature of the charge made. (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.)

A plaintiff's burden in asserting a fraud claim against a corporation is even greater. (*Lazar v. Superior Court, supra,* 12 Cal.4th at p. 645.) In that case, the plaintiff must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Tarmann v. State Farm Mut. Auto. Ins. Co., supra,* 2 Cal.App.4th at p. 157.)

***10** The fraud causes of action relate to the allegations that defendants failed to disclose the Building's defects and falsely represented that they would comply with building, fire and safety codes and would repair and maintain the Building so that it would become fit for occupancy. For example, the fifth cause action alleges that CFM and Leith

> "knew or should have known that there were structural defects which it did not disclose and that the property, building and premises were not suitable for its intended purpose when they leased the premises to plaintiff. Defendants failed to disclose these to Plaintiff. Defendants knew or should have known that building, fire and safety code violations existed and a Permit to occupy the building or the leased premises could not be maintained. Defendants failed to disclose this to Plaintiff. Defendant made oral and written promises regarding maintenance, repairs and Turlock City Code compliance which it knew or should have known it could or would not keep. Defendant knowingly leased the premises to Plaintiff without disclosing these material facts to Plaintiff.
>
> "... Upon commencement of the [L]ease and during the term of the Lease, Defendants represented that they had

> and would comply with building, fire and safety codes of the City of Turlock; that they had and would repair and maintain the building, the roof and other portions of the building structures. Defendants further represented that they had and would fulfill their requirements pursuant to the [L]ease. Defendant also represented that the building and premises was fit and would become fit for use and occupancy. Defendants knew or should have known these things to be untrue. Defendants knew that Plaintiffs relied or would rely and that this would cause Plaintiff damage, all to their loss, damage and detriment, resulting in General and Special damages sustained by Plaintiff according to proof in excess of 43 million."

The sixteenth cause of action alleged against CFM and Crockett contains essentially the same allegations with two additions. The complaint alleges that during March 2002 and October 31, 2003, defendants were actively marketing the property and in contrast to their dealings with plaintiff, were disclosing the defects to third parties. The complaint further states that each of the defendants falsely promised that they would either allow plaintiff to remove its items and improvements from the property or would reimburse plaintiff for those items and improvements.

The thirty-eighth cause of action is stated against all defendants and parallels the fifth cause of action.[3]

[3] Appellants are also pursuing the twenty-fifth cause of action. That cause of action attempts to state a fraud claim against defendant Vierramoore, Inc. However, appellants did not appeal the judgment of dismissal as to Vierramoore and Vierramoore is not a party to this appeal.

These causes of action are very general regarding " ' "how, when, where, to whom, and by what means the representations were tendered." ' " (*Lazar v. Superior Court, supra,* 12 Cal.4th at p. 645.) As to the individuals, Crockett and Leith, the allegations do not specify when or where each of those defendants made false promises and what the promises attributed to each defendant specifically were. The vague allegation that the representations were made "[u]pon commencement of the [L]ease and during the term of the Lease" is inadequate. Allegations that plaintiffs actually relied on the representations and that such reliance was justified are also missing.

***11** The fraud causes of action alleged against the corporate defendants, CFM and REI, are also insufficient. The complaint lacks any indication of who the persons were who made the representations, whether those persons were authorized to speak for the corporations, who those persons spoke to, what those persons said or wrote, and when it was said or written.

Thus, appellants did not comply with the specificity requirements for a fraud action against either an individual or a corporation. Accordingly, the trial court correctly sustained respondents' demurrers to the fraud causes of action. The next question is whether the court abused its discretion in refusing to again grant leave to amend.

Before the fourth amended complaint was filed, this lack of specificity in the fraud causes of action was raised twice by respondents. Nevertheless, appellants failed to cure this deficiency. The demurrers to the fourth amended complaint raised this particular pleading defect for the third time. As noted by the California Supreme Court in *Johnson v. Ehrgott* (1934) 1 Cal.2d 136, "there must be a limit to the number of amended complaints." (*Id.* at p. 138.) "Where plaintiffs fail to allege a cause of action after numerous, successive attempts and without overcoming the same grounds for demurrer, the natural, probable and reasonable inference is that they are, under the circumstances, incapable of amending the pleadings to allege a good cause of action." (*Archuleta v. Grand Lodge etc. of Machinists* (1968) 262 Cal.App .2d 202, 210.)

On appeal, appellants acknowledge that they could plead the fraud claims with greater detail, especially as to the corporate defendants. However, except for stating that the allegations could be made more specific by pleading reliance and that the reliance was justifiable and by pleading the names of the agents, their authority, and when the representations were made, appellants do not set forth the facts they could allege to satisfy the heightened pleading requirement. Appellants simply state that the facts are within their knowledge and thus leave to amend would resolve the issue.

As noted above, the burden is on the appellants to show the manner in which the complaint can be amended and how the amendment will cure the defect. (*McKelvey v. Boeing North American, Inc., supra,* 74 Cal.App.4th at p. 161.) Appellants have not met this burden. Accordingly, appellants have not demonstrated that the trial court abused its discretion in denying leave to amend.

**4. *Statement of reasons for sustaining demurrers.***

Appellants contend the trial court's order sustaining the

demurrers did not comply with Code of Civil Procedure section 472d because the court did not include a statement of the specific ground or grounds upon which the order was based. However, this section provides that the statement of the grounds "may be by reference to appropriate pages and paragraphs of the demurrer." The trial court employed this method and incorporated by reference all grounds stated in the demurrers. Accordingly, the trial court's order was procedurally proper. (Cf. *B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 958-959.)

**5. *Conclusion.***

***12** With respect to the causes of action that are dependent on a landlord-tenant relationship, i.e., breach of contract and breach of the covenant of good faith and fair dealing, the demurrers to the entire complaint were properly sustained as to plaintiffs Parineh and Austiaj, and as to defendant Leith. These individuals were not parties to the lease. However, the trial court erred in sustaining the remaining demurrers to the entire complaint.

The demurrers to the causes of action for breach of contract and breach of the covenant of good faith and fair dealing should not have been sustained as to CFM, Crockett and REI. NSF stated a cause of action in those counts. However, the demurrers to the causes of action alleging fraud were properly sustained without leave to amend.

The trial court awarded attorney fees to REI, CFM and Crockett based on the prevailing party clause in the lease. The reversal of the judgment of dismissal in favor of those defendants requires the reversal of this attorney fee award as well. (*Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 673.)

## DISPOSITION

The judgment is reversed in part and remanded to the trial court with instructions to vacate its order sustaining the demurrers without leave to amend to the entire complaint as to plaintiff NSF and as to defendants REI, CFM and Crockett and to enter a new order overruling those demurrers as to those parties.

The trial court is further ordered to vacate its order sustaining the demurrers without leave to amend to the first, ninth (except as to Leith), tenth (except as to Leith), twelfth, twentieth, twenty-first, thirtieth, forty-second, forty-third, forty-fifth, and forty-sixth causes of action and to enter a new order overruling those demurrers.

The order sustaining the remaining demurrers without leave to amend is affirmed. On remand, NSF may amend its complaint consistent with this opinion.

The order awarding REI, CFM and Crockett attorney fees is reversed. The parties to bear their own costs on appeal.

WE CONCUR: WISEMAN, Acting P.J., and KANE, J.

**All Citations**

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